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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden, *Petitioner*,

v.

STEVIE LAMAR FIELDS, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

QUESTIONS PRESENTED

In Coleman v. Thompson, 501 U.S. 722 (1991), this Court recognized that when "a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred[,]" absent a showing of cause and prejudice or a miscarriage of justice. Id. at 750. An independent and adequate state procedural rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991).

1. Did the Ninth Circuit err (1) by using the date of Fields's state appeal, rather than the date the state court applied its rule, as the trigger date for its analysis of whether the rule was regularly followed and (2) by finding California's longstanding and commonplace procedural rule that habeas corpus is not a substitute for appeal (the "Dixon" rule) inadequate to bar federal review?

2. Are state procedural rules improperly subject to a more stringent standard on federal habeas corpus than that applied to federal procedural rules in federal court?

3. May a federal habeas corpus court deem a state procedural rule inadequate to preclude habeas corpus review, absent a showing by the petitioner that he was denied a reasonable opportunity to raise his federal claims in state court without unreasonable obstacles being in his way by the state?

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All parties appear in the caption of the case.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. _____

ARTHUR CALDERON, Warden, *Petitioner*,

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PETITION FOR WRIT OF CERTIORARI

Petitioner Arthur Calderon, Warden ("the Warden") respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at 125 F.3d 757 (9th Cir. 1997).

The opinion of the United States District Court appears at Appendix B to the petition and is unreported.

JURISDICTION

The United States Court of Appeals decided this case on September 10, 1997. A timely petition for rehearing was denied by the United States Court of Appeals on October 29, 1997. Copies of the orders denying rehearing and staying the mandate appear at

Appendix G. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Former 28 U.S.C. § 2254 (reprinted in Appendix E)

STATEMENT OF THE CASE

On July 6, 1979, a Los Angeles County Superior Court jury found respondent Stevie Lamar Fields ("Fields") guilty as charged in a 14-count information with one count of robbery-murder, plus various counts of robbery, kidnap for robbery, forcible oral copulation, rape, assault with a deadly weapon and kidnap, with personal handgun use in 10 counts. The parties stipulated that Fields had been convicted of voluntary manslaughter in 1976.

On July 12, 1979, after a sanity hearing, the jury found Fields legally sane at the time of his offenses. On July 17, 1979, at the conclusion of the penalty phase, the jury returned a verdict of death. The trial court sentenced Fields to death.

The conviction was affirmed by the California Supreme Court on direct review in 1983. People v. Fields, 35 Cal. 3d 329, 197 Cal. Rptr. 803, 673 P.2d 680 (1983), cert den. Fields v. California, 469 U.S. 892 (1984).

In 1984, Fields filed a petition for writ of habeas corpus in the California Supreme Court. In 1985, Fields filed an amended petition. In December of 1990, the California Supreme Court denied the petition for writ of habeas corpus. In re Fields, 51 Cal. 3d 1063, 275 Cal. Rptr. 384, 800 P.2d 862 (1990), cert den. Fields v. California, 502 U.S. 845 (1991).

On May 25, 1993, Fields filed a habeas corpus petition in the United States District Court, which had jurisdiction of the proceeding under 28 U.S.C. §2254.

On July 29, 1993, the California Supreme Court decided In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993), and In re Harris, 5 Cal. 4th 813, 21 Cal. Rptr. 2d 373, 855 P.2d 391 (1993), which clarified (and strengthened) existing California procedural default law. Clark at 756; Harris at 829.

On August 2, 1993, Fields filed an amended federal petition. In its order of October 20, 1993, the district court found that a number of Fields's claims were unexhausted and ruled that the federal proceedings would be held in abeyance so that Fields could return to state court to exhaust his remedies or, in the alternative, file an amended federal petition containing only exhausted claims.

On January 14, 1994, Fields filed a second state petition, which contained virtually all of the claims he had presented to the federal court, plus one claim not presented in the federal petition. On October 14, 1994, the California Supreme Court denied the state petition for writ of habeas corpus. Citing In re Harris, 5 Cal. 4th at 829, and In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953), the California court denied 11 claims in whole or in part "on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition." App. C.

Fields filed a petition for writ of certiorari from the denial of the last state habeas corpus petition on January 12, 1995. His petition was denied on March 20, 1995. Fields v. California, 115 S. Ct. 1369, 131 L. Ed. 225 (1995).

Fields returned to the United States District Court with his second amended petition for writ of habeas corpus on March 21, 1995. On July 31, 1995, the Warden filed a motion to dismiss on grounds of procedural default the 11 claims denied by the California Supreme Court as untimely because they could have been, but were not, raised in Fields's appeal or first state habeas corpus petition. Fields opposed the motion. After a hearing on the motion, the United States District Court found California's Dixon rule independent of federal law and adequate to support the judgment, in that it was firmly established both at the time of Fields's direct appeal in 1981 and at the time when he filed his second state

habeas corpus petition in 1994. Accordingly, the court granted the Warden's motion and dismissed all of the claims as to which the Warden had asserted procedural bar. On July 30, 1996, the district court denied Fields's motion for reconsideration and granted his request to take an interlocutory appeal of the dismissal order.

Fields appealed to the United States Court of Appeals for the Ninth Circuit, which properly assumed jurisdiction pursuant to 28 U.S.C. §1292(b) and Rule 5(a) of the Federal Rules of Appellate Procedure. In a published decision filed on September 10, 1997, the Ninth Circuit vacated the judgment of the United States District Court, holding that the adequacy of California's Dixon rule should have been measured as of 1981, the year of Fields's direct appeal, rather than at any subsequent time, such as the date when the Supreme Court invoked the bar. Fields v. Calderon, 125 F.3d 757, 761 (9th Cir. 1997). The Ninth Circuit panel found that because the state's application of its Dixon rule had been inconsistent in 1981, Fields was deprived of notice. Id.

Since Fields had not attempted to show inconsistency by providing a survey of California cases, the court independently undertook to do so. Id. at 761, 764-65. Without explanation of its methodology, the court selected a nine-year period from 1973 through 1981. Id. at 764. It found that nine published cases had alluded to the Dixon rule. Of those nine cases, five had been decided by the California Court of Appeal, and only four by the California Supreme Court. Id. at 764 & 764 n.7. Fields, as a death penalty defendant, had never been, and would never be, subject to the jurisdiction of the Court of Appeal, and the Court of Appeal is not the court of last resort in California. Nonetheless, the Ninth Circuit panel treated the five Court of Appeal decisions with a dignity equal to that afforded the four cases decided by the California Supreme Court. Id. at 764-65. Relying most heavily on two California Court of Appeal cases, the Ninth

Circuit found that the Dixon rule had not been consistently applied by the state courts in 1973 through 1981. Id.

On October 7, 1997, the Court of Appeals denied the Warden's petition for rehearing but did not properly enter the order. On October 29, 1997, in response to the Warden's motion, the panel entered an amended rehearing denial order and granted the Warden a 30-day stay of the mandate. The stay was extended another 30 days on November 28, 1997. On December 29, 1997, the Warden applied for a second extension of the stay of the mandate. The Ninth Circuit granted the Warden's request, extending the stay of the mandate to and including January 27, 1998.

REASONS FOR GRANTING THE WRIT

WITHOUT PROMPT AND FIRM INTERVENTION BY THIS COURT, CALIFORNIA'S PROCEDURAL DEFAULT RULES WILL CONTINUE TO BE SET AT NAUGHT BY THE NINTH CIRCUIT

This Court has firmly held that federal courts are barred from reviewing on habeas corpus a state prisoner's federal claims if he has defaulted them in state court under an independent and adequate state rule of procedure.[1] Coleman v. Thompson, 501 U.S. 722, 751

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1. A state procedural rule must be both independent of federal law and adequate to bar federal review. Ford v. Georgia, 498 U.S. 411, 424 (1991). In this case, the Ninth Circuit panel expressly declined to address Fields's claim that the Dixon rule is dependent on federal law, so the rule's independence is not currently at issue. Fields, 125 F.3d 757, 760. The independence of this sort of state rule is not generally at issue. See, e.g., Murray v. Carrier, 477 U.S. 478,

(1991). A state procedural rule is adequate if it is "'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991). This message has not reached the Ninth Circuit.

Continuing its systematic dismantling of California's procedural defaults as bars to federal collateral review, the Ninth Circuit has now held California's "Dixon" bar inadequate. Fields v. Calderon, 125 F.3d 757, 765. In this most recent example, the court turned its attention to a longstanding, commonplace procedural rule, which provides that an issue that could have been raised on direct appeal, but was not, cannot be raised later on state habeas. In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513, 514-15 (1953).

The Ninth Circuit's disinclination to honor California's procedural bars has been amply demonstrated over the past few years by a series of cases in which the federal reviewing court repeatedly found various California rules, as measured by varying and inconsistent trigger dates, were "pre-In re Clark," and therefore inadequate to bar federal review. For example, in Siripongs v. Calderon, the Ninth Circuit measured adequacy from the date of the petitioner's final state-court habeas corpus denial in 1991, which predated the 1993 Clark and Harris decisions. It found California's application of the rule inconsistent in 1991 and held the state's successive-petition default inadequate to bar federal review of Siripongs's claims. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

In Morales v. Calderon, as it had done in Siripongs, the Ninth Circuit measured the independence and adequacy of California's timeliness rule as of the date of the California Supreme Court rejection of the claim on procedural grounds. Morales v. Calderon, 85 F.3d 1387,

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482-83 (1986); Deere v. Calderon, 890 F. Supp. 893, 896, 901 (C.D.Cal. 1995) (Dixon rule).

1388, 1392-93 (9th Cir. 1996). In Morales, the date of that denial order was July 28, 1993, the day before the Supreme Court filed Clark and Harris. Morales, 85 F.3d at 1391, 1393. After finding that the state enforced the rule inconsistently as of July 28, 1993, the Ninth Circuit held that the state rule was inadequate to bar federal review. Id.

By 1996, when the Ninth Circuit decided Calderon v. United States District Court for the Eastern District of California (Bean), the ground rules had changed. The Bean court assessed the consistency of the state's timeliness bar at the time of Bean's initial default -- his direct appeal -- even though the state court did not apply the procedural rule until 1995, well after the California court's 1993 decisions in Clark and Harris. Bean, 96 F.3d 1126, 1128, 1130-31 (9th Cir. 1996).

Later that year the Ninth Circuit found California's timeliness and Dixon rules inadequate, premising its finding on an evaluation of the consistency with which the state followed those rules as of 1987, when Hayes filed his first state habeas petition, rather than 1994, when the California Supreme Court invoked the bar against Hayes. Calderon v. U.S. Dist. Ct. for E.D. of California (Hayes), 103 F.3d 72, 75 (9th Cir. 1996).

And now that court, following Bean but inexplicably ignoring Siripongs, Morales and even Hayes, has determined in Fields that the trigger-date for its consistency analysis is the defendant's direct appeal. Fields v. Calderon, 125 F.3d at 765. Without prompt and firm intervention by this Court, California's legitimate efforts to protect its judgments from the unwarranted interference of the lower federal courts are futile.

The Ninth Circuit's hostility to California's procedural bars stands in stark contrast to this Court's traditional respect for such bars. As recently as its decision in Lambrix v. Singletary, this Court reemphasized:

> A State's procedural rules are of vital importance to the orderly administration of its criminal courts; when a federal court permits them to be readily evaded, it undermines the criminal justice system.

Lambrix, ___ U.S. ___, 117 S. Ct. 1517, 1522-23, 137 L. Ed. 2d 771 (1997). The Ninth Circuit has not heeded this admonition.

As this Court has pointed out time and again in recent years, the principle of procedural default is not an arid technicality. It is a fundamental element of the doctrine of the federal system, based on the recognition that federal relief has the effect of nullifying independent state rules. It is designed to ensure that state courts have an opportunity to address federal claims in the first instance by precluding a defendant from taking his claims straight to federal court. It vindicates a state's basic interest in the finality of its judgments, and protects them from stale and meritless claims filed years, or even decades, after conviction. Coleman v. Thompson, 501 U.S. at 729-32; Harris v. Reed, 489 U.S. 255, 262 (1989); Michigan v. Long, 463 U.S. 1032, 1040 (1983); Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977).

In Coleman, this Court held:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice .... We now recognize the important interest in finality served by state procedural rules, and the significant

> harm to the States that results from the failure of federal courts to respect them.

Coleman at 729. The decision in Coleman rests on enduring principles limiting federal habeas corpus jurisdiction. Francis v. Henderson, 425 U.S. 536, 542 (1976) ("no reason to . . . give greater preclusive effect to procedural defaults by federal defendants than to similar defaults by state defendants"); Brown v. Allen, 344 U.S. 443, 485-87 (1953) (state procedural default for notice of appeal, filed one day late, found virtually identical to federal rule and held independent and adequate to bar federal review); Ex parte Spencer, 228 U.S. 652, 659-60, 663 (1913) (state prisoner barred from raising ex post facto issue on habeas because "the writ of habeas corpus is not to be used as a writ of error"). More than 50 years ago, in Yakus v. United States, 321 U.S. 414, 444 (1944), this Court explained:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.

Id.; accord, United States v. Olano, 507 U.S. 525, 531 (1993).

Recently, this Court has spoken even more plainly on this point, while also reminding federal habeas courts of the importance of treating state procedural defaults with the same deference they apply to their own default rules: "We see no reason to afford habeas review to a state prisoner . . . who let a time clock run without alerting the trial court, yet deny collateral review to a federal prisoner similarly situated." Reed v. Farley, 512 U.S. 339, 129 L. Ed. 2d 277, 292 (1994); Francis v. Henderson, 425 U.S. at 542.

The Warden, in accordance with this Court's jurisprudence, has consistently asserted a few long-

standing, well-established, easily-understood procedural bars in the Ninth Circuit, almost always to no avail. Until this Court intercedes to rectify the Ninth Circuit's mischief, that court will continue to effectively decimate California's system of procedural-default rules, thereby depriving California of the legitimate expectation of finality of its judgments.[2]

Procedural default has become a battleground in the Ninth Circuit, especially in capital cases. This Court has phrased its standards and rules at a reasonable and understandable level of abstraction, anticipating that the lower courts would apply those rules with appropriate concern for comity. In the Warden's view, that has not happened in the Ninth Circuit.

This case is a prime example of the harm that can be done to state-court procedural rules when federal-court oversight is grudging and suspicious, rather than deferential and respectful. This case also illustrates, in concrete terms, the practical harm that stems from a federal court's erroneous repudiation of state procedural bars. The facts on which Fields's allegations rest are now two decades old, and the state's ability to defend has been severely prejudiced. The Ninth Circuit gave no apparent consideration to this legitimate state interest.

Indeed, the Ninth Circuit went out of its way to reach its result. When Fields himself did not make a district-court record on the issue of inconsistent application of the state's Dixon rule, the Ninth Circuit

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2. This Court has denied petitions for writs of certiorari in Calderon v. United States District Court (Hayes), 103 F.3d 72, 94, cert. denied 117 S. Ct. 2532, 138 L. Ed. 2d 1031 (1997); Calderon v. United States District Court (Bean), 96 F.3d 1126, 1194, cert. denied 117 S. Ct. 1569, 137 L. Ed. 2d 714 (1997); Morales v. Calderon, 85 F.3d 1387 (9th Cir. 1996), cert. denied 117 S. Ct. 500, 136 L. Ed. 2d 391 (1996); Siripongs v. Calderon, 35 F.3d 1308, cert. denied 513 U.S. 1183 (1995).

panel did it for him. The panel went outside the record, conducting its own sua sponte survey of California's Dixon-bar cases, without notice to, or briefing by, the parties. Without explanation or analysis, the panel held that the Dixon rule's adequacy -- not only whether the rule was firmly established, but also whether it was consistently applied -- was to be evaluated as of the date of Fields's appeal in 1981, rather than in 1994, the date when the rule was invoked. In addition, although the Dixon rule had been in existence for decades by 1981, the panel inexplicably limited its case-law survey of the rule to nine published cases decided during the nine-year period immediately preceding Fields's appeal, and it improperly considered five Court of Appeal cases, even though Fields, a death penalty inmate, was never subject to the Court of Appeal's jurisdiction, and the Court of Appeal was not the court of last resort in California. Some of these cases, moreover, involved aspects of the Dixon rule quite different from that invoked by the state supreme court in the Fields case. The panel's ultimate findings of inconsistency and inadequacy were understandably colored by its failure to give the Warden notice or an opportunity to address the evidence and findings it asserted in its survey until he filed his rehearing petition.

Given the Ninth Circuit's unfriendliness to California's procedural bars, those rules are all at risk of being rendered useless to preclude federal review. The Warden urges this Court to grant certiorari in this case, not only to correct the particular errors made here, but also to signal its determination to vindicate the important comity and finality concerns which have been central to the reform of federal habeas corpus over the past quarter century. Those reforms have not taken hold in the Ninth Circuit. Without prompt remedial action by this Court, procedural default will be a dead letter in California.

I.

In Assessing the Regularity of the California Supreme Court's Application of its Dixon Rule, the Ninth Circuit Should Have Measured From the Date of the State Court's Action in Denying Fields' Final Habeas Petition

The Ninth Circuit panel found that the Dixon rule was not regularly followed by the state courts in 1981, the year Fields filed his opening brief on appeal. Patently confusing firm establishment with regularity of application, the panel erroneously concluded that California's allegedly irregular application deprived Fields of notice. Fields, 125 F.3d at 761.

A state procedural rule is adequate to bar federal review if it is "'firmly established and regularly followed' by the time as of which it is to be applied." Ford v. Georgia, 498 U.S. 411, 424 (1991); James v. Kentucky, 466 U.S. 341, 348-49 (1984). The "firmly established" element of adequacy is a notice requirement: "a petitioner must have been apprised of the rule's existence at the relevant time." Deere v. Calderon, 890 F. Supp. 893, 897 (C.D.Cal. 1995).

Fields had abundant notice of the Dixon rule at the time of his appeal in 1981. In re Dixon had been decided in 1953, nearly three decades earlier. Dixon itself was nothing new. It had relied on earlier cases and merely restated a rule that was well established even in 1953. Dixon, 41 Cal. 2d at 759. Fields knew at the time of his appeal that California's rule dictated that he raise all of his of-record claims in his direct appeal. He could have taken the prudent course of raising those contentions on appeal, but he apparently chose instead to risk holding back some of his of-record claims so they could be raised later. This tactical election was not forced on him, nor

was he gulled into believing he could safely wait until some unspecified time in the future. The necessity of making a series of tactical choices, each of which has consequences, is hardly unique to Fields or, indeed, to any defendant.

In 1994, the California Supreme Court found that Fields had violated its established procedural rule by raising claims in his 1994 habeas petition which he could and should have brought in 1981 on direct appeal. A Ninth Circuit panel has now rewarded Fields for holding back claims for 13 years, and in doing so has undermined the State's legitimate interest in enforcing its reasonable procedural rules to achieve finality of its criminal judgments. The panel was wrong to ignore the fact that Dixon had been firmly established at least since 1953, and that it provided Fields with sufficient notice of the rule in 1981.

The Ninth Circuit erred as well in assessing the "regularity" of the rule's application as of 1981. The Warden submits that the proper trigger date for a consistency-of-application evaluation is 1994, the date when the California Supreme Court actually applied the Dixon rule and denied 11 claims contained in Fields's final state habeas corpus petition on procedural grounds. In the language of this Court's decision in Ford v. Georgia, "an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied." Ford, 498 U.S. at 424, emphasis added. The language emphasized in Ford is prospective, not retrospective. It must therefore refer to the time when the bar is invoked to defeat the petitioner's final petition, here 1994.[3]

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3. Of course, this analysis presupposes, as is true in this case, that the rule was firmly established, that is to say, that petitioner was on notice of the rule in 1981, at the time when he committed the

As previously discussed, earlier Ninth Circuit cases assumed the trigger to be the date of the California Supreme Court's ultimate procedural denial. Morales v. Calderon, 85 F.3d at 1388, 1392-93 (independence and adequacy of procedural rule measured as of date of California Supreme Court decision in which claim is rejected on grounds of procedural bar because filed one day before Clark and Harris); Siripongs v. Calderon, 35 F.3d at 1318 (similar). As the state-court denial dates became more recent, moving beyond the California Supreme Court's decisions in Clark and Harris, and the application of the rule became presumptively adequate, the Ninth Circuit sought trigger events farther back into the past. Hayes, 103 F.3d at 75 (critical date to judge default was 1987, when Hayes filed his first state habeas petition and failed to raise all claims); Bean, 96 F.3d at 1131 (trigger date for consistency analysis held to be date when Bean filed his direct appeal).

Because the federal court is evaluating the propriety of the state court's action of denying the writ on procedural grounds, the only logical trigger is the date when the state court invoked its procedural rule, not the date of the petitioner's earlier default.

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original default.

II.

The Ninth Circuit Erred by Subjecting California's Procedural Rules to a More Grudging and Suspicious Standard than it Applies to the Invocation of Federal Procedural Default Rules

A. The California Supreme Court Properly Clarified its Rules in 1993

The Ninth Circuit reached its conclusion that California's Dixon rule was inconsistently applied by placing great reliance on the California Supreme Court's declaration in the 1993 companion cases of In re Clark and In re Harris that California's longstanding habeas rules needed to be "reexamine[d]" and their purposes "reiterate[d]" (Harris, 5 Cal. 4th at 826). Fields, 125 F.3d at 762. The Fields panel seized upon the historical discussion of habeas practice contained in Clark, 5 Cal. 4th 750, and concluded that California's "application of its procedural rules had become irregular and inconsistent[,]" and the two cases "were intended to reestablish California's procedural rules governing state habeas petitions . . . ." Fields, 125 F.3d at 763. The panel found that the California Supreme Court had, in effect, confessed to irregularities of application. Id. The Ninth Circuit was wrong.

In Clark and Harris, the California Supreme Court was, at most, merely restating its longstanding default rules and making sure that the very limited exceptions were clearly understood. The California Supreme Court in Harris never admitted to any inconsistency in its own practices. On the contrary, it stated:

> This latter rule (that habeas corpus will not lie ordinarily as a substitute for an appeal or as a

> second appeal) is now firmly established and often repeated without much explication. (Citations.) As with many rules of law, multiple repetitions over time may tend to obscure the original purpose of the rule. (Citations.) With the large number of petitions for writs of habeas corpus filed in the courts of this state and the concomitant burden on the judiciary to evaluate the hundreds of petitions ultimately barred on procedural grounds, it is important to reexamine and reiterate the purpose of the Waltreus rule.[4/]

In re Harris, 5 Cal. 4th at 826.

In relying on the California high court's clarification to invalidate the rule, the Ninth Circuit has subjected California's interpretation of its procedural rules to a test far more stringent than is warranted, in derogation of the principles of comity and federalism. See, McCleskey v. Zant, 499 U.S. 467, 477 (1991). In fact, the "admissions" the Ninth Circuit found California to have made in Harris and Clark of a need for clarification of its own rules are virtually indistinguishable from this Court's acknowledgment in McCleskey.

In McCleskey, this Court prefaced its discussion of McCleskey's claim with a straightforward admission relating to its abuse-of-the-writ standard and a history of its practices:

> Much confusion exists, though, on the standard for determining when a petitioner abuses the writ. Although the standard is central to the proper determination of many federal habeas

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4. The procedural rule at issue in Harris was the so-called "Waltreus" rule (In re Waltreus, 62 Cal. 2d 218, 225 (1965)), which precludes a petitioner from raising in a habeas corpus petition an issue which was previously raised and rejected on appeal. However, the Harris court noted that much of its Waltreus discussion applied to the Dixon rule as well. Harris, 5 Cal. 4th at 825 n.3.

> corpus actions, we have had little occasion to define it. Indeed, there is truth to the observation that we have defined abuse of the writ in an oblique way, through dicta and denials of certiorari petitions or stay applications. Today we give the subject our careful consideration.

McCleskey, 499 U.S. at 477, emphasis added. Justice Kennedy, writing for a six-member majority, followed those words with a meticulous and exhaustive history of this Court's practices in abuse-of-the-writ cases. Id.at 477-97. The abuse-of-the-writ default rule in McCleskey was one of long standing which this Court forthrightly acknowledged had not been rigorously enforced. That did not prevent this Court from announcing a policy of stricter enforcement. It did not even prevent this Court from applying that new policy to McCleskey himself, because this Court understood that by clarifying its own application policies, it had not denied McCleskey notice of its abuse-of-the-writ policies. McCleskey, 499 U.S. at 470, 477.

This elementary distinction has been lost on the Ninth Circuit. If McCleskey had been decided by a California court, its default finding would have been held inadequate to bar federal review. Fields, 125 F.3d at 762-63. That would have been wrong in McCleskey, and it is wrong in Fields.[5]

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5. In fact, the Ninth Circuit refused to apply McCleskey retroactively in Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), and was reversed per curiam by this Court, with a citation to McCleskey. Angelone v. Deutscher, 500 U.S. 901 (1991).

B. The Federal Courts Owe State Procedural Rules the Same Respect They Show Their Own Federal Procedural Rules

In Coleman v. Thompson, adverting to its own settled acceptance of the vital interest served by federal procedural bars, this Court plainly stated that the states' procedural bars were entitled to the same deference:

> We also eliminate inconsistency between the respect federal courts show for state procedural rules and the respect they show for their own.

Coleman v. Thompson, 501 U.S. at 751; Francis v. Henderson, 425 U.S. at 541-42.

Not so in the Ninth Circuit.

In habeas corpus actions brought by federal prisoners, where its own judgments are at stake, the Ninth Circuit has taken a hard line:

> Section 2255 is not designed to provide criminal defendants repeated opportunities to overturn their convictions on grounds which could have been raised on direct appeal. The Supreme Court has held that where a criminal defendant fails to make allegations of error at trial or on direct appeal he must demonstrate (cause and actual prejudice).

United States v. Dunham, 767 F.2d 1395, 1396 (9th Cir. 1985), citing United States v. Frady, 456 U.S. 152, 168 (1982), and Davis v. United States, 411 U.S. 233, 236-45 (1973); see also Abatino v. United States, 750 F.2d 1442, 1445 (where petitioners failed to object at trial and failed to raise of-record issue on direct appeal, they committed a double procedural default); Hammond v. United States, 408 F.2d 481, 483 (9th Cir. 1969) (§2255 may not be invoked to relitigate questions which were or should have been raised on direct appeal). As the Ninth Circuit wrote of a federal prisoner's habeas petition,

> If a criminal defendant could have raised a claim of error on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing his procedural default, and actual prejudice resulting from the claim of error. (Citation.) "Once the defendant's chance to appeal has been waived or exhausted, . . . we are entitled to presume he stands fairly and finally convicted, especially when . . . he already has had a fair opportunity to present his federal claims to a federal forum." Id.at 164.

United States v. Johnson, 988 F.2d 941, 945 (9th Cir. 1993).

When the Ninth Circuit turns it attention to California judgments, as demonstrated by that court's decisions in Siripongs, Morales, Bean, Hayes, and now Fields, the hard line is applied against the state courts themselves, not against defaulting petitioners. California has a well-established appellate process for the presentation of a defendant's claims, and its default rules are properly intended to serve as a finding that a conviction is fair and final. This Court should direct the Ninth Circuit to treat California's procedural Dixon rule with the same measure of respect it would accord its analog in a §2255 case.

Notwithstanding its apparently greater respect for federal defaults, the Ninth Circuit itself at times muddies the waters, leading to legitimate questions about its own consistency in interpreting its procedural rules. For example, in English v. United States, 42 F.3d 473 (9th Cir. 1994), the panel distinguished Frady, holding that the defendants' failure to raise an of-record claim in their direct appeals was not a default and considering the claim on the merits. English, 42 F.3d at 476; see also United States v. de la Fuente, 8 F.3d 1333, 1336 n.4 (9th Cir. 1993) (to similar effect, but nullifying default based on failure to object).

Without regard to the merits of English and de la Fuente, it is well established that an occasional act of grace in which a court excuses or disregards its own rule does not render the rule inadequate. Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989); Amos v. Scott, 61 F.3d 333, 342 (5th Cir. 1995). Thus, the Warden does not suggest that the decisions in English and de La Fuente nullify the procedural bars they disregard. Still, sauce for the goose is sauce for the gander. If federal procedural rules are considered consistent, even though some federal courts occasionally disregard or distinguish away those rules, the state-court rules should be treated with equal deference. This case presents this Court with an opportunity to prompt the Ninth Circuit to treat California's procedural rules with the same consideration and deference it reserves for its own rules.

III.

The Ninth Circuit Erred in Finding California's Dixon Rule Inadequate to Preclude Federal Habeas Review, Because Fields Failed to Prove he was Denied a Reasonable Opportunity to Raise his Federal Claims in State Court Without Unreasonable Obstacles Being Placed in his Way by The State

The purpose of the federal court's evaluating both notice ("firmly established") and consistency ("regularly followed") is to determine whether the defendant was given a reasonable opportunity to raise his federal claims in state court without unreasonable obstacles being placed in his way by the state authorities. Wright, Charles et al., 16B Federal Practice and Procedure §4027 at 392 (2nd ed. 1996), citing Davis v. Wechsler, 263 U.S. 22 (1923). A lack of consistency is significant because it may evidence the state court's discrimination against a petitioner's assertion of his federal rights. Johnson v. Mississippi, 486 U.S. 578, 587-89 (1988); Prihoda v. Mc Caughtry, 910 F.2d 1379, 1383 (7th Cir. 1990).

As the Fields panel tacitly acknowledged, Fields had the burden of presenting evidence of irregularity and inconsistency, but did not do so. McCleskey v. Zant, 499 U.S. at 494; Fields, 125 F.3d at 761, 764. Instead of holding this default against Fields, the panel launched a sua sponte survey of nine cases over a nine-year period from 1972 to 1981 to make the case for inconsistency. Ironically, but perhaps predictably, the Ninth Circuit's survey of California's Dixon bar was seriously flawed in a number of different ways.

First, the parties neither briefed nor argued the contents, methodology and conclusions of the court's

survey. Without the participation of the parties and the consequent adversarial testing, the Court made fundamental errors of fact and law. In addition, the court's survey was too broad, in that it considered five California Court of Appeal cases, which were irrelevant to the analysis, because Fields had never been, and never would be, subject to that court's jurisdiction, and the California Supreme Court was the court of last resort.

The court's survey was also too narrow, in that it limited itself arbitrarily to the nine-year period which preceded Fields's appeal. The panel did not explain why its survey should not have included all California Supreme Court decisions filed during the 28 years between the decision in Dixon and Fields's direct appeal defaults. The sample was also skewed because it incorrectly excluded thousands of non-published California Supreme Court habeas orders. It is well known that courts generally publish cases which break new ground or deviate from the norm. As a consequence, a "survey" which fails to account for routine non-published assertions of the procedural bar is without validity.[6]

In any event, an evaluation of consistency should be more than just a mechanical toting-up of state cases. This Court has at times articulated a highly deferential view of state courts, in which "it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe (state) . . . laws correctly." Murdock v. City of Memphis, 87 U.S. 590, 626 (1875). Consistent with that view is this Court's decision in Davis v. Wechsler, in which it held that state courts had the right to erect procedural

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6. Although a thorough survey of this kind is likely to be a labor-intensive undertaking for the petitioner, the state should not be penalized by the federal court's considering only published decisions, which are almost definitionally deviations from the norm, to find there was no adherence to the procedural rule.

bars so long as they did not put unreasonable obstacles in the way of individuals attempting to assert federal rights. Davis, 263 U.S. at 24-25. Thus, the Court has honored the states' invocation of procedural rules so long as the rules have not been invoked with "pointless severity," NAACP v. Alabama ex rel. Flowers, 377 U.S. 288, 297 (1964), or as "an arid ritual of meaningless form," Wright v. Georgia, 373 U.S. 284, 291 (1963), or in a "novel" fashion, NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 457-58.

On other occasions, notably on direct review of a state judgment when a federal right, especially a civil right, has been at issue, this Court has articulated different standards of adequacy. Those standards do not focus on whether the defendant was given a reasonable opportunity to litigate his federal claims in state court without unreasonable obstacles being placed in his way by the state but rather assume plenary review of the federal question because the state's invocation of its procedural rule is suspicious. Sullivan v. Little Hunting Park, 396 U.S. 229, 234 (1969) (where plaintiffs challenged a "whites-only" membership policy as discriminatory, the Virginia Supreme Court's procedural default rule did not bar federal review); Williams v. Georgia, 349 U.S. 375, 383 (1955) (where state's action in barring review of a claimed violation in its jury selection method of white tickets for whites and yellow tickets for blacks appeared to be an avoidance of the federal right to equal protection, the rule was inadequate to bar federal review of the substantive issue). Likewise, this Court found the state's bar inadequate where it appeared the rule might have been invoked for the first time in the case under consideration. Johnson v. Mississippi, 486 U.S. at 588.

Not surprisingly, different circuits view consistency differently. For example, in contrast to the Ninth Circuit's stingy analysis of consistency, the Seventh Circuit's is considerably more deferential:

> Searching for "regularity" in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and the inferior courts respect state procedural rules unless they are regularly disregarded (or seemingly have been manufactured for the occasion, as in Johnson). A state ground that is solidly established will be respected even though not "strictly" followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interests of federalism would be served by such a development.

Prihoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir. 1990). Prihoda is in accord with this Court's decision not to reach the merits in Swaggart Ministries v. Cal. Bd. of Equalization, because the state's rule served a legitimate interest in requiring parties to exhaust administrative remedies, and the state's procedural rule was unambiguously applied. Id. at 493 U.S. 378, 397-98 (1990). Significantly, this Court found that Swaggart had "failed to substantiate any claim that the California courts in general apply this exception in an irregular, arbitrary, or inconsistent manner." Id. at 399.

If, as Professor Wright and this Court's decision in Davis v. Wechsler have suggested, the object of the exercise is to be certain that the defendant was given a reasonable opportunity to raise his federal claims in state court without unreasonable interference by the state, the Warden submits that a petitioner should bear the burden

of making a prima facie case of prejudicial inconsistency or discriminatory invocation of the rule.

In this case, Fields has never suggested that he was singled out for harsh treatment, let alone that the California Supreme Court discriminated against his assertion of his federal rights, as was true in Sullivan and Williams.

This Court should grant certiorari to establish the principle that the petitioner bears the burden of demonstrating the inadequacy of the state rule in the district court. To make his showing, he would need to make a prima facie case that he was not given a reasonable opportunity to raise his federal claims in state court without unreasonable obstacles being placed in his way by the state. To that end, petitioner could present evidence in this case that the state afforded him no notice of the rule at the time of the original default in 1981, or that it was invidiously applied when it was invoked against him in 1994. The trigger date, apportionment of the burden of proof and minimum proof necessary to show inadequacy of the state rule need to be definitively established, and that can be accomplished only by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: January 27, 1998.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FIELDS,
Petitioner-Appellant,

v.

ARTHUR CALDERON, Warden,
Respondent-Appellee.

No. 96-99014
D.C. No.
CV-92-00465-DT
OPINION

Appeal from the United States District Court
for the Central District of California
Dickran M. Tevrizian, District Judge, Presiding

Argued and Submitted
June 19, 1997—San Francisco, California

Filed September 10, 1997

Before: Harry Pregerson, Charles Wiggins, and
Thomas G. Nelson, Circuit Judges.

Opinion by Judge Nelson

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals vacated a judgment of the district court. The court held that the California rule precluding state habeas relief when claimed errors could have been, but were not, raised on direct appeal does not provide an adequate state ground to bar federal review of claims defaulted in 1981.

In 1979, appellant Stevie Fields was convicted of murd and sentenced to death. In 1983, his conviction and senten were affirmed by the California Supreme Court on dire appeal. In 1984, he filed a state petition for a writ of habe corpus, which was denied in 1990. In May 1993, he filed federal petition for a writ of habeas corpus.

In July 1993, the California Supreme Court decided *In Harris*, 95 P.2d 391 (Cal. 1993) and *In re Clark*, 855 P.2d 7 (Cal. 1993).

The district court stayed the federal proceedings to allo Fields to exhaust his state remedies. In January 1984, Field filed a second petition for habeas corpus in the Californi Supreme Court. The Court denied the petition, on the groun of untimeliness, in that the claims could have been, but wer not raised on appeal or in the first habeas corpus petition.

In 1995, Fields filed an amended habeas petition in the di trict court. The court dismissed the claims on the ground procedural default.

[1] The *Dixon* rule, established by the California Suprem Court in 1953, provides that a writ of habeas corpus will n lie where the claimed errors could have been, but were n raised on a timely appeal from a judgment of conviction. the *Dixon* rule provides an adequate and independent sta ground for the California Supreme Court's decision. Field defaulted procedurally on the affected claims and could n raise them in federal court unless he showed cause and preju dice or a fundamental miscarriage of justice.

[2] The proper date on which the rule's adequacy was to b measured had to be determined. The State argued that the co rect trigger date was October 14, 1994, the date on which th California Supreme Court denied Fields's second state habea petition, when the procedural bar at issue was actuall applied. Fields argued that the trigger date was 1981, the tim

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of his direct appeal, when the defaulted claims should have been raised.

[3] A state's procedural rule used to bar consideration of a claim must have been firmly established and regularly followed by the time as of which it is to be applied. [4] The *Dixon* rule applies when the petitioner had an opportunity to raise the claims on direct appeal. In this case, that moment was 1981, the year of Fields's direct appeal.

[5] Under the adequate and independent state grounds doctrine, federal courts will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. [6] For the procedural default doctrine to apply, a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default.

[7] *In re Harris* involved the application of the *Waltreus* rule, which generally prevents a habeas petitioner from raising a claim for habeas review that was previously heard and decided on direct appeal. The discussion in the case also applied to the *Dixon* rule. [8] The California Supreme Court engaged in a lengthy discussion of four exceptions to the two rules and explicitly acknowledged that its application of the rules had become obscured over the years by the development of a number of exceptions, requiring the court to provide needed guidance to the bench and bar.

[9] *In re Clark* involved the application of the procedural rules regarding the timeliness of habeas petitions and the doctrine of separate petitions, barring a petitioner from raising claims in a second habeas petition that could have been, but were not, raised in the first habeas petition. [10] The California Supreme Court clearly stated that the application of its procedural rules governing habeas petitions had become irregular and inconsistent. The opinions in *In re Clark* and *In re*

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Harris were intended to reestablish California's procedu rules governing state habeas petitions and clearly define a limit the applicable exceptions.

[11] The 1993 decisions, though instructive on the questi of the adequacy of the *Dixon* rules, did not answer the que tion of exactly *when* the *Dixon* rule and other rules h become irregular and inconsistently applied.

[12] A survey of the California cases decided in the ni years preceding and including Fields's appeal that address how the *Dixon* was being applied **[13]** demonstrated that co sideration of constitutional claims not raised on direct appe had become the norm, even in cases where the *Dixon* rule w clearly applicable.

[14] The 1993 decisions and the independent survey su port the conclusion that the *Dixon* rule was not an adequa state ground to bar federal review of Fields's default claims.

COUNSEL

David S. Olson, Carlsmith, Ball, Wichman, Case, & Ichik Los Angeles, California, for the petitioner-appellant.

Carol Federick Jorstad, Deputy Attorney General, Los Ang les, California, for the respondent-appellee.

OPINION

T.G. NELSON, Circuit Judge:

Stevie Lamar Fields ("Fields") appeals the district court order granting Warden Calderon's ("the State's") motion t

dismiss eleven claims contained in Fields' second amended federal petition for writ of habeas corpus because they were declared procedurally defaulted by the California Supreme Court. We have jurisdiction under 28 U.S.C. § 1292(b). We vacate and remand.

PROCEDURAL HISTORY

In 1979, Fields was convicted of murder and sentenced to death.[1] In 1983, his conviction and sentence were affirmed by the California Supreme Court on direct appeal. *People v. Fields*, 673 P.2d 680 (Cal. 1983), *cert. denied*, 469 U.S. 892 (1984).

In 1984, Fields filed a petition for writ of habeas corpus in the California Supreme Court. After a hearing on the issue of whether Fields' attorney provided ineffective assistance, the California Supreme Court denied the petition in 1990, holding that Fields suffered no prejudice from his attorney's alleged incompetence. *In re Fields*, 800 P.2d 862 (Cal. 1990), *cert. denied*, 502 U.S. 845 (1991).

On May 25, 1993, Fields filed a federal petition for writ of habeas corpus in district court. On July 29, 1993, the California Supreme Court decided two cases that are critical to the resolution of this appeal: *In re Clark*, 855 P.2d 729 (Cal. 1993), and *In re Harris*, 855 P.2d 391 (Cal. 1993).

On August 2, 1993, Fields filed an amended federal habeas petition. The State moved to dismiss the petition on the grounds of procedural default. Finding unexhausted claims, the district court stayed federal proceedings on October 20, 1993, in order to allow Fields an opportunity to exhaust his state claims.

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[1]The facts of the underlying crime can be found in *People v. Fields*, 673 P.2d 680 (Cal. 1983).

On January 14, 1994, Fields filed a second petition for w of habeas corpus in the California Supreme Court. The St moved for denial of the state petition on procedural groun On October 14, 1994, the California Supreme Court den Fields' second state habeas petition. In the portion relevant this appeal, the California Supreme Court ruled:

> The following claims are denied on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition: the claims set forth in parts IX (A, B, E, F, G), X (B, C, F, G, H, I), XV, XVIII, XXI (as to the claim relating to the instruction on suppression of evidence), XXIII, XXIV, XXV, XXVI, XXX, XXXI. (*In re Harris* (1993) 5 Cal.4th 813, 829; *In re Dixon* (1953) 41 Cal.2d 756, 759.)[2]

On March 20, 1995, the United States Supreme Court den certiorari. *Fields v. California*, 514 U.S. 1022 (1995).

On March 21, 1995, Fields filed a second amended hab petition in the district court. On July 31, 1995, the State fi a motion to dismiss the claims denied by the Califor Supreme Court's order due to procedural default. After hearing, the district court granted the motion on June 1996, and dismissed all of the claims to which the State h asserted a procedural bar. On July 30, 1996, the district co denied Fields' motion for reconsideration and granted motion for interlocutory appeal. On August 27, 1996, granted Fields permission to take an interlocutory appeal this dismissal order.

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[2]In Fields' federal petition, these claims are numbered VII (A, B, E G), VIII (B, C, F, G, H, I), XIII, XVI, XIX, XXI, XXII, XXIII, XX XXVIII, and XXIX respectively.

DISCUSSION

"The district court's dismissal of the petition for writ of habeas corpus on the ground of state procedural default involves an issue of law that we review *de novo*." *Morales v. Calderon*, 85 F.3d 1387, 1389 n.6 (9th Cir.), *cert. denied*, 117 S. Ct. 500 (1996). *See also Hunter v. Aispuro*, 982 F.2d 344, 346 (9th Cir. 1992).

[1] The issue for decision is whether the California Supreme Court's *Dixon* rule serves as an adequate and independent state ground for its denial of eleven claims in Fields' habeas petition. In *Dixon*, the California Supreme Court held:

> The general rule is that habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.

Ex parte Dixon, 264 P.2d 513, 514-15 (Cal. 1953) (In Bank) (citations omitted). If the *Dixon* rule provides an adequate and independent state ground for the California Supreme Court's decision, Fields "has defaulted procedurally on the affected claims and cannot raise them in federal court unless he shows cause and prejudice or a fundamental miscarriage of justice." *Morales*, 85 F.3d at 1389 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)). Because we conclude that the *Dixon* rule is not an adequate state ground to bar federal review of Fields' defaulted claims, we will not address Fields' alternative argument that the *Dixon* rule is not an independent state ground sufficient to bar federal review.[3]

[3]We further decline to address Fields' argument that the California Supreme Court's order on October 14, 1994, denying his second state habeas petition, is ambiguous. We assume, for purposes of this opinion, that the order is not ambiguous.

A. *The Trigger Date*

[2] Before addressing the adequacy of the *Dixon* rule, w must first determine the proper date on which the rule's ad quacy is to be measured. The district court ruled that "[t]h *Dixon* rule was firmly established both at the time petitione filed his second habeas petition [January 14, 1994] and at th time of his direct appeal [1981]." The State argues that th correct trigger date is October 14, 1994, the date on which th California Supreme Court denied Fields' second state habea petition where the procedural bar at issue was actuall applied. Fields argues that the correct trigger date is 1981, th time of his direct appeal, when the defaulted claims shoul have been raised. Our discussion of the 1981 date will demon strate the flaw in the State's reasoning.

[3] The Supreme Court of the United States has made clear that a state's procedural rule used to bar considerati of a claim "must have been 'firmly established and regularl followed' by the time as of which it is to be applied." *For v. Georgia*, 498 U.S. 411, 424 (1991) (quoting *James v. Ken tucky*, 466 U.S. 341, 348 (1984)). In *NAACP v. Alabama e rel. Patterson*, 357 U.S. 449, 457 (1958), the Court refused t apply a state's procedural rule, because the defendant then could not be "deemed to have been apprised of its existence." In *Ford*, the Supreme Court said that applying the rule to For would "apply a rule unannounced at the time of [Ford's] tri . . . ." *Ford*, 498 U.S. at 424.

We have held that the proper time for determining whethe a procedural rule was firmly established and regularly fo lowed is "the time of [the] purported procedural default." *Calderon v. Bean*, 96 F.3d 1126, 1130 (9th Cir. 1996), *cert denied*, 117 S. Ct. 1569 (1997). Therefore, we examin whether the state courts were regularly and consistentl applying the relevant procedural default rule "at the time th claim should have been raised." *Calderon v. Hayes*, 103 F.3 72, 75 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 2532 (1997)

[4] With respect to the *Dixon* rule, we have held that a relevant point of reference for assessing its application is the time at which the petitioner "had an opportunity to raise the claims on direct appeal." *Id. See also Bean*, 96 F.3d at 1131 (evaluating the *Dixon* rule "at the time Bean filed his direct appeal"). Because the *Dixon* rule precludes collateral review of a claim that could have been brought on direct appeal, the procedural default, though announced by the California Supreme Court when the habeas petition is denied, technically occurs at the moment the direct appeal did not include those claims that should have been included for review. In this case, that moment is 1981, the year of Fields' direct appeal.

In addition to avoiding the unfairness of applying a new rule retroactively, the requirement that the rule be in existence at the time of the claimed default, the 1981 appeal in this case, also gives the defendant and his counsel notice that the claims must be raised at that time. A trigger date of 1994, when the default rule was actually applied by the California Supreme Court, would not insure that Fields and his counsel knew in 1981 that all claims had to be raised then or be held to be procedurally barred. The requirement of notice thus dooms the State's attempt to use 1994 as the trigger date. A consistently applied rule in 1994 could not cure a lack of notice in 1981.

Fields does not attempt to demonstrate the inconsistent application of the *Dixon* rule in 1981 by employing the traditional method of providing "a representative sample of cases in which the default was either invoked or, at least, where it arguably might have been applicable but was disregarded." *Fierro v. Calderon*, No. CV-94-3198-LGB, at 15 (C.D. Cal. June 12, 1996) (citing *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 263-64 & n.14 (1982)). Instead, Fields argues that the California Supreme Court's reevaluation of its procedural rules in the 1993 cases of *In re Harris*, 855 P.2d 391 (Cal. 1993), and *In re Clark*, 855 P.2d 729 (Cal. 1993), decided between Fields' direct

appeal and the California Supreme Court's denial of clev
claims in his habeas petition due to procedural default, esta
lishes that the *Dixon* rule was not regularly and consisten
applied at the time of his direct appeal. We therefore turn
the question, not previously decided in this circuit, wheth
the *Dixon* rule and the standards governing its applicati
were firmly established and consistently followed at the ti
of Fields' direct appeal in 1981.[4]

B. *The Adequacy of the Dixon Rule*

[5] Under the adequate and independent state grounds do
trine, federal courts "will not review a question of federal la
decided by a state court if the decision of that court rests
a state law ground that is independent of the federal questi
and adequate to support the judgment." *Coleman v. Thom*

[4]In previous cases, we have avoided the resolution of this issue. S
Hayes, 103 F.3d at 75 (noting that "[w]hether the *Dixon* rule was su
ciently clear and consistently applied before *Harris* is open to so
question," but declining to decide the question, holding, in a petition
writ of mandamus, that the district court's conclusion that the *Dixon* r
was inadequate to bar review was not clearly erroneous); *Bean*, 96 F.
at 1131 (noting that "[w]hether the *Dixon* rule was sufficiently clear a
consistently applied at the time Bean filed his direct appeal [in 1981]
open to some question," but holding that "[w]e need not resolve the iss
here . . . since the California Supreme Court's order provides no ba
upon which to apply the *Dixon* rule, if adequate, to Bean's claims.").

There is a conflict in the federal district courts in California as
whether the *Dixon* rule is adequate to bar federal habeas review
defaulted claims. *See, e.g., Fierro v. Calderon*, No. CV-94-3198-LGB,
16 (C.D. Cal. June 12, 1996) (ruling that "the California Supreme Cour
recent reevaluation of its procedural rules [in *Harris* and *Clark*] all h
establishes that the *Dixon* rule is not adequate"); *Deere v. Calderon*, 8
F. Supp. 893, 901 (C.D. Cal. 1995) (noting that the *Dixon* rule had exist
for forty years and ruling that "[p]etitioner has not offered the Court a
compelling justification for disregarding the state court denial of the eig
claims on the additional ground that they could have and should have be
raised in petitioner's direct appeal"); *Odle v. Calderon*, 884 F. Supp. 140
1413 (N.D. Cal. 1995) (concluding that "the *Dixon* procedural rule has n
been uniformly and regularly applied by the California Supreme Court

son, 501 U.S. 722, 729 (1991). "[T]he procedural default doctrine is a specific application of the general adequate and independent state grounds doctrine." *Wells v. Maass*, 28 F.3d 1005, 1008 (9th Cir. 1994). The procedural default doctrine "bar[s] federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." *Coleman*, 501 U.S. at 729-30.

[6] Not all state procedural bars are adequate to foreclose federal review. For the procedural default doctrine to apply, "a state rule must be clear, consistently applied, and well-established at the time of the petitioner's purported default." *Wells*, 28 F.3d at 1010 (citing *Ford v. Georgia*, 498 U.S. 411, 424-25 (1991)). *See also Morales*, 85 F.3d at 1390 ("Nor can a state preclude federal review by invoking procedural rules that the state does not apply consistently."). "The reason for these requirements . . . is that it is grossly unfair—and serves none of the purposes of respect for procedural rules—to forfeit an individual's constitutional claim because he failed to follow a rule that was not firmly established at the time in question." *Bean*, 96 F.3d at 1129 (quotations and citations omitted).

The mere fact that a state's procedural rule includes an element of discretion does not render it inadequate. *Morales*, 85 F.3d at 1392. We have held:

> It is true . . . that procedural rules need not be utterly mechanical. That the application of a rule requires the exercise of judicial discretion does not render the rule inadequate to support a state decision. . . . [J]udicial discretion is the exercise of judgment according to standards that, at least over time, can become known and understood within reasonable operating limits.

Id. So long as standards governing the exercise of discreti are firmly established and are consistently applied, a stat procedural rule will be adequate to bar federal claims.

[7] *In re Harris*, 855 P.2d 391 (Cal. 1993), involved habeas petitioner who was attempting to assert a claim habeas that had previously been heard and decided on dir appeal. California's procedural rule that generally prevent petitioner from raising a claim for habeas review that was p viously heard and decided on direct appeal is known as *Waltreus* rule, derived from *In re Waltreus*, 397 P.2d 1 (Cal. 1965).[5] Although *In re Harris* directly involved application of the *Waltreus* rule, the California Supre Court made clear that "[m]uch of the following discuss also applies to the so-called '*Dixon* rule,' which gener prohibits raising an issue in a postappeal habeas corpus p tion when that issue was not, but could have been, raised appeal." *In re Harris*, 855 P.2d at 395 n.3.

The *In re Harris* court began its discussion by noting it has long been the rule in California that "habeas corpus not lie ordinarily as a substitute for an appeal nor as a sec appeal." *Id.* at 396. However, because

> multiple repetitions [of the rule] over time may tend to obscure the original purpose of the rule[.] . . . [and] large number[s] of petitions for writs of habeas corpus [are] filed in the courts of this state[,] the concomitant burden on the judiciary to evaluate the hundreds of petitions ultimately barred on procedural grounds [makes] it . . . important to reexamine and reiterate the purpose of the *Waltreus* rule.

Id. (citations and footnote omitted).

[5]We note that a claim barred from further state court review b *Waltreus* rule would not be barred from review in federal habeas. would be an exhausted claim.

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PUBLISHER'S NOTE:

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intervening judicial decision). *See id.* at 398-407. This extensive discussion would not have been necessary if the California Supreme Court had regularly and consistently applied the *Dixon* and *Waltreus* rules in previous cases. Instead, it is evident that, over the years, a number of situations developed that compelled the court to create exceptions to these rules in the effort to better formulate the "proper balance" between finality and justice in habeas review. Because the California Supreme Court explicitly acknowledged that its application of the *Waltreus* and *Dixon* rules had become obscured over the years by the development of a number of exceptions, requiring the court to provide "needed guidance to the bench and bar" regarding the application of these rules, we conclude that the *Dixon* rule is not an adequate state ground to bar federal habeas review of Fields' defaulted claims.

[9] Our conclusion is strengthened by the California Supreme Court's opinion in *In re Clark*, 855 P.2d 729 (Cal. 1993), decided the same day as *In re Harris*. *In re Clark* involved the application of the procedural rules regarding the timeliness of habeas petitions and the doctrine of separate petitions, barring a petitioner from raising claims in a second habeas petition that could have been, but were not, raised in the first habeas petition. The court began its analysis with a general discussion of the historical development and application of the state's habeas procedural rules and the relevant exceptions. Though the court in *In re Clark* specifically declined to "clarify and limit the exceptions to the rules of *In re Waltreus* . . . and *In re Dixon*" because that question was to be decided in *In re Harris*, the court clearly intended its general discussion of California's habeas procedural rules to encompass the *Dixon* and *Waltreus* rules. *Id.* at 737-40, 741 n.8.

[10] At the outset of its general analysis, the court explained:

> Before considering the possible merit of any claim, it is therefore appropriate to review the deci-

> sional and statutory law governing collateral attacks on judgments of conviction by petition for writ of habeas corpus. *In addition, because no clear guidelines have emerged in our past cases, we consider when departure from those rules is warranted.*

Id. at 737 (emphasis added). Later in the discussion, the co held:

> Our past decisions have thereby suggested that the rules against piecemeal presentation of claims and repetitious petitions are *subject to undefined exceptions* and that the court may be willing to entertain multiple collateral attacks on a judgment notwithstanding the potential for abusive writ practice.

Id. at 740 (emphasis added). The California Supreme C could hardly have stated more clearly that the applicatio its procedural rules governing habeas petitions had bec irregular and inconsistent. The opinions in *In re Clark* an *re Harris* were intended to reestablish California's proced rules governing state habeas petitions and clearly define limit the applicable exceptions.

[11] These decisions from the California Supreme Cou 1993, though certainly instructive on the question of the quacy of the *Dixon* rule, do not answer the question of ex *when* the *Dixon* rule and other rules had become irregular inconsistently applied. As we noted earlier, Fields did not vide us with a survey of cases to demonstrate the inconsi application of the *Dixon* rule in *1981*, the time of his d appeal.

[12] However, we have conducted our own survey of fornia cases decided in the nine years preceding and inclu Fields' appeal (1973-1981). *See Johnson v. Mississippi*, U.S. 578 (1988) (wherein the Supreme Court undertoo own survey of state court cases to determine the adequac

a procedural bar). We note in passing that during those years, habeas petitions were initially filed in California Superior Court with rights of appeal to both the California Court of Appeal and the California Supreme Court. Therefore, published decisions from both of California's appellate courts are instructive as to how the *Dixon* rule was being applied. After we eliminated the cases that cited the *Dixon* rule, but did not actually involve the possibility of the rule's application, we were left with nine cases.[7]

The *Dixon* case itself involved a claimed denial of constitutional rights (an unlawful search and seizure and a coerced confession), and the rule that emerged from *Dixon* originally applied to such claims. "The same principles should apply even though the alleged errors involving factual issues relate to an asserted denial of constitutional rights." *Dixon*, 264 P.2d at 515.

[13] As the nine cases from 1973 to 1981 demonstrate, however, consideration of constitutional claims not raised on direct appeal had become the norm, even in cases where the *Dixon* rule was clearly applicable. In only two cases (*Jones* and *In re Ronald E.*), was the *Dixon* rule specifically applied to bar review of an issue. In one other case (*In re Brown*), the court stated the *Dixon* rule, and then construed the habeas petition as one for mandamus. In the other cases, the rule was not applied to block consideration of the defaulted issue. *See, e.g., In re Walker*, 518 P.2d at 1134 (assuming special circumstances exist in order to avoid the *Dixon* rule and reach the merits of the petition).

---

[7] *In re Walker*, 518 P.2d 1129 (Cal. 1974) (In Bank); *In re Brown*, 511 P.2d 1153 (Cal. 1973) (In Bank); *People v. Jones*, 510 P.2d 705 (Cal. 1973) (In Bank); *People v. Vaughn*, 508 P.2d 318 (Cal. 1973) (In Bank); *In re Fuller*, 177 Cal. Rptr. 233 (Cal. Ct. App. 1981); *In re Watson*, 154 Cal. Rptr. 151 (Cal. Ct. App. 1979); *In re Ronald E.*, 132 Cal. Rptr. 1 (Cal. Ct. App. 1976); *In re Duran*, 113 Cal. Rptr. 442 (Cal. Ct. App. 1974); *In re Young*, 107 Cal. Rptr. 915 (Cal. Ct. App. 1973).

The *Fuller* case perhaps best represents the lack of ance the *Dixon* rule was providing by 1981. The Cou Appeal said:

> We shall determine the case on the merits. It is true that as a general rule habeas corpus cannot serve as a substitute for appeal. (*In re Dixon* (1953 41 Cal.2d 756, 759, 264 P.2d 513.) The rule yields however, in special circumstances; courts do not always require the exhaustion of appellate remedies. (Ibid.; *In re Black* (1967) 66 Cal.2d 881, 887, 59 Cal.Rptr. 429, 428 P.2d 293; see Witkin, Cal.Criminal Procedure (1963) *Habeas Corpus and Other Extraordinary Writs*, § 797, p. 769.) Here, as in *In re Black*, *supra*, petitioner's continued confinement followed "somewhat unique" developments and the issue he presents is jurisdictional. It is also apparently novel. We are thus *disposed* to consider it.

In re Fuller, 177 Cal. Rptr. 233, 235-36 (Cal. Ct. App. (emphasis added).

The flexible application of the *Dixon* rule was also cl illustrated in *Duran*:

> The Attorney General points out Duran has a remedy through his appeal from the order revoking probation, and moves to dismiss the petition on that basis. While ordinarily habeas corpus is not a substitute for appeal (*In re Dixon*, 41 Cal.2d 756, 264 P.2d 513), this Court has discretion to issue the writ if it believes an appeal is not adequate, or if a prompt disposition is required in the interests of justice. (*In re Baird*, 150 Cal.App.2d 561, 563, 310 P.2d 454; Witkin, Calif.Crim.Proc., p. 770). This is such a case.

In re Duran, 113 Cal. Rptr. 442, 444 (Cal. Ct. App. 19

[14] The California Supreme Court's 1993 decisions in *In re Harris* and *In re Clark*, combined with our independent survey of California case law for most of the decade preceding Fields' direct appeal in 1981, convince us that the *Dixon* rule is not an adequate state ground to bar federal review of Fields' defaulted claims.

CONCLUSION

For the foregoing reasons, the district court's order dismissing claims VII (A, B, E, F, G), VIII (B, C, F, G, H, I), XIII, XVI, XIX, XXI, XXII, XXIII, XXIV, XXVIII, and XXIX contained in Fields' petition for writ of habeas corpus is VACATED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

VACATED AND REMANDED.

APPENDIX B

ENTERED
CLERK, U S DISTRICT COURT
JUN 12 1996
CENTRAL DISTRICT OF CALIFORNIA
DEPUTY

FILED
JUN 10 1996
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

STEVIE LAMAR FIELDS, Petitioner, v. ARTHUR CALDERON, Warden of California State Prison State Prison at San Quentin, Respondent.	CASE NO. CV 92-0465 DT ORDER RE RESPONDENT'S MOTION TO DISMISS CLAIMS BARRED BY STATE PROCEDURAL DEFAULT

Background

1. Factual Summary

In 1978, within two weeks of being released from prison on a manslaughter charge, petitioner embarked on a "one-man crime wave." He kidnaped a young woman and forced her to write him a check from her bank account. Petitioner accused the victim of not giving him a check from her bank account. Petitioner accused the

victim of not giving him all her money and killed her for trying to "run a game on him."

Approximately one week later, petitioner and an accomplice kidnapped, robbed, assaulted and raped two prostitutes. Petitioner then released the victims. A few hours later, petitioner and his accomplice kidnaped a college student. Petitioner robbed and raped the girl, then eventually released her.

Petitioner was convicted in 1979 of the robbery-murder of Rosemary Cobb and of three counts of robbery, three counts of kidnaping, three counts of forcible oral copulation, two counts of rape and one count of assault with a deadly weapon. The jury found true the special circumstance of premeditated murder in the course of a robbery.

At the penalty phase, the parties stipulated that petitioner had previously been convicted of manslaughter after killing a man with a dumbbell bar. The prosecution introduced a photograph of the manslaughter victim's body. Petitioner presented no evidence. The jury sentenced him to death.

1. Procedural History

Petitioner's conviction and sentence were affirmed on direct appeal. People v. Fields, 35 Cal.3d 329 (1983). In 1984, Fields filed a petition for writ of habeas corpus in the state supreme court. After a referee hearing on the limited issue of whether Fields' trial counsel's performance was deficient, the California Supreme Court denied the petition in 1990, holding that petitioner suffered no prejudice from trial counsel's alleged incompetence. In re Fields, 51 Cal.3d 1063 (1990).

In 1993, Fields filed a federal habeas petition. The federal petition was found to contain unexhausted claims, and petitioner was sent back to state court for exhaustion. In 1994, he filed a second state habeas

petition presenting the unexhausted claims to California Supreme Court. On October 14, 1994, the court issued a postcard denial of the state habeas petition. All but two of the claims presented were denied on procedural grounds.

Petitioner filed an amended federal petition on March 21, 1995. On July 31, 1995, respondent filed a Motion to Dismiss Claims Barred by State Procedural Default which is presently before this Court.

Petitioner filed an opposition to the motion on August 28; the state filed its reply on September 5. Further briefing was ordered on January 22, 1996, and was submitted by respondent and petitioner on January 25 and February 1, respectively.

Discussion

1. Standard

A. Assessing the Adequacy of a State Procedural Default

"In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prison can demonstrate cause for the default and actual prejudice as a result of the violation of federal law, or demonstrates that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 750 (1991). This doctrine is based on considerations of federalism and comity. See Michigan v. Long, 463 U.S. 1032, 1040 (1983).

For a state procedural rule to be adequate, it must be "strictly or regularly followed." Johnson v. Mississippi, 486 U.S. 578, 587 (1988). The state rule need not be followed in every case where the bar is applicable. There is room for exceptions and the occasional exercise

of mercy. However, the rule must, at a minimum, be applied in the "vast majority of the cases." Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989).

As a corollary to the requirement of strict application, a state procedural rule is not adequate if it "appears to be discretionary." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). "A state may not, in the exercise of its discretion, decline to entertain a constitutional claim while passing on kindred issues raised in the same manner." Williams v. Georgia, 349 U.S. 375, 383 (1955). Procedural defaults that are discretionary "cannot act as a bar to federal review." Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994).

The procedural rule must also have been firmly established at the time of the alleged default. "If the petitioner's failure to raise a claim did not violate any then-existing rule, he did not commit a procedural default." English v. United States, 42 F.3d 473, 478 (9th Cir. 1994). "Where there is reason for confusion or uncertainty with respect to state procedures, a procedural default will be inadequate to bar federal habeas relief." Harmon, 959 F.2d at 1462.

B. A Claim That is Otherwise Procedurally Barred May Be Reviewed on the Merits Upon a Showing of Cause and Prejudice or a Fundamental Miscarriage of Justice.

If a claim is found to be procedurally barred by an adequate and independent state law rule, in appropriate circumstances, a federal court may still review the merits of a defaulted claim. "The doctrine of procedural default is based on comity, not jurisdiction, and the federal courts retain the power to consider the merits of procedurally defaulted claims." Harmon, 959 F.2d at 1461. However, petitioner must "show cause for the default and prejudice attributable thereto, or demonstrate

that the failure to consider the federal claim will result in a fundamental miscarriage of justice." Harris v. Reed, 489 U.S. 255, 262 (1988) (internal quotations omitted).

The existence of "cause" for a procedural default "must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986).

2. Application of Doctrine of Procedural Bar to the Instant Case

A. The Procedural Defaults Expressed in *In re Dixon* and *In re Harris* are Applicable.

The California Supreme Court issued a postcard denial of Fields' second state habeas petition on October 14, 1994. The state court denied 20 claims and subclaims on the "procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition." The court then cited In re Harris, 5 Cal.4th at 829, and In re Dixon, 41 Cal.2d at 759, in support of the denial.

Respondent, in support of his motion to dismiss, asserts that the state habeas claims were untimely and thus were denied based on the rule expressed in In re Clark, 5 Cal.4th at 756, that a petitioner must "explain and justify any significant delay in seeking habeas corpus relief." However, the mere existence of a basis for a state procedural bar does not deprive a federal court of jurisdiction, "the state court must actually have relied on the procedural basis for its disposition of the case." Caldwell v. Mississippi, 472 U.S. 320, 326 (1985). A federal habeas court may review a claim on the merits unless the state court made a "clear and express" statement that it relied upon procedural grounds.

Carriger v. Lewis, 971 F.2d 329, 333 (9th Cir. 1992) (en banc) (citing Thomas v. Lewis, 945 F.2d 1119, 1122-23 (9th Cir. 1991). The California Supreme Court clearly relied on the rules expressed in Harris and Dixon. The fact that another procedural default rule may have been available -- but not applied -- cannot be used to bar federal review. Caldwell v. Mississippi, 472 U.S. 320, 326-28 (1985). Therefore, the analysis of the instant motion is focused on whether the procedural bar rules from Harris and Dixon act to bar federal review of the claims identified by respondent.

B. At the Time Petitioner Defaulted on his State Court Claims, the *Dixon* Rule Was Regularly and Consistently Applied

In 1953, the California Supreme Court decided In re Dixon, 41 Cal.2d 756 (1953). The court held that, "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction." Id. at 759. Other California courts followed this rule for 40 years. See In re Shipp, 62 Cal.2d 547, 552 (1965); In re Black, 66 Cal.2d 881, 887 (1967); In re Terry, 4 Cal.3d 911, 923 (1971); In re Walker, 10 Cal.3d 764 (1974); In re Bower, 38 Cal.3d 865, 872 (1985).

In 1993, the California Supreme Court recognized the continuing vitality of the Dixon rule in its decision in In re Harris, 5 Cal. 4th at 829. In Harris, the court reiterated the rule set forth in Dixon and stated that "an unjustified failure to present an issue on appeal will generally preclude its consideration in a post-conviction petition for writ of habeas corpus." Id. at 829.

Petitioner argues that the fact that the California courts have sometimes reviewed claims brought in a state

habeas petition that could have been raised on direct appeal renders the Dixon rule discretionary. However, the cases in which the state courts have reviewed claims on habeas that could have been raised on direct appeal have done so because the petitioner made a showing of "special circumstances" that constituted an excuse for the failure to bring them on appeal. See e.g. In re Wallace, 3 Cal.3d 289, 292 (1970); In re Black, 66 Cal.2d at 887. The fact that the state court did not review petitioner's claims is evidence that he did not raise the type of special circumstances that will convince the state court to overlook a Dixon violation. This Court will not second-guess the state court in the application of its own rules. Absent a showing of special circumstances, Dixon will bar claims that could have been, but were not, brought on direct appeal. This rule was regularly and consistently applied at the time of the default.

Other federal courts have come to this same conclusion. In Deere, 890 F.Supp at 901, the district court found that the rule stated that the Harris/Dixon bar was a valid procedural default. The facts of Deere are very similar to the facts of Fields' case. In Deere, the petitioner's conviction and sentence were affirmed on direct appeal in 1991. He filed his first state habeas petition in January 1991; it was denied in June 1991. Deere then filed a federal habeas petition which contained unexhausted claims. Deere was sent back to state court to exhaust the claims. He filed a second state habeas petition in December 1993 which was denied on the grounds of untimeliness and because the claims could have been, but were not, raised on appeal. Deere, 890 F.Supp 895-96. The district court found that the state court's ruling on the second state habeas petition acted as a procedural bar to federal review of Deere's claims.

The rule in California that claims that could be brought on direct appeal would not, absent special circumstances, be cognizable on habeas review has been

in existence for 40 years. The continuing vitality of this rule was affirmed by the California Supreme Court in 1993. The Dixon rule was firmly established both at the time petitioner filed his second habeas petition and at the time of his direct appeal. Petitioner was presumptively aware of the Dixon rule when he briefed the issues to be presented on direct appeal. Insofar as the Dixon rule was "in existence at the time of the alleged default," English, 42 F.3d at 478 (emphasis in original), it can serve as "the sort of firmly established and regularly followed state practice that can prevent implementation of federal rights." James, 466 U.S. at 348.

For the reasons stated in this Order, respondent's Motion to Dismiss Claims Barred by State Procedural Default is GRANTED and claims VII (A,B,E,F,G), VIII (B,C,F,G,H,I), XIII, XVI, XIX, XXI, XXII, XXIII, XXIV, XXVIII and XXIX are dismissed.

Petitioner shall file a brief within 15 days of the date of this order showing cause for the default and prejudice attributable thereto, or demonstrating that the failure to consider the federal claim will result in a fundamental miscarriage of justice. Respondent shall file a responsive brief within 15 days of the filing of petitioner's brief and petitioner shall file a reply within 15 days of the filing of respondent's brief.

IT IS SO ORDERED.

Dated: June 10, 1996.

DICKRAN TEVRIZIAN

Dickran Tevrizian
United States District Judge

APPENDIX C

SUPREME COURT
FILED
OCT 14 1994
ROBERT WANDRUFF Clerk
Deputy

No. S037370

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

IN RE STEVIE LAMAR FIELDS
ON
HABEAS CORPUS

Petition for writ of habeas corpus DENIED.

Parts I through VII, and XXXIII, of the petition comprise statements of the procedural and factual posture of the case and do not set forth separate claims by petitioner.

The following claims are denied on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas corpus petition: the claims set forth in parts IX (A, B, E, F, G), X (B, C, F, G, H, I); XV, XVIII, XXI (as to the claim relating to the instruction on suppression of evidence), XXIII, XXIV, XXV, XXVI, XXX, XXXI. (In re Harris (1993) 5 Cal.4th 813, 829; In re Dixon (1953) 41 Cal.2d 756, 759.)

The following claims are denied on the procedural ground they previously were raised and rejected on appeal or in the first habeas corpus petition: the claims set forth in parts IX (C, D), X (A, D, E), XI, XII, XIII, XIV, XVI, XVII, XIX, XX, XXI (with the exception of the claim relating to the instruction on suppression of evidence), XXII, XXVII, XXVIII, XXIX. (In re Harris, supra, 5 Cal.4th 813, 825; In re Waltreus (1965) 62 Cal.2d 218, 225.)

The claims set forth in parts VIII (A, B, C, D, E, F, G, H, I) and XXXII, are denied on the merits.

Mosk, J., is of the opinion an order to show cause should issue.

Kennard

Acting Chief Justice

APPENDIX D

FILED
DEC 30 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON,	)
Warden,	)
	)
Respondent-Appellee.	)
	)

Before: T.G. NELSON, Circuit Judge.

Appellee's "Motion to Extend the Stay of Mandate" is GRANTED. The mandate is stayed through January 27, 1998.

FILED
DEC 1 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON,	)
Warden,	)
	)
Respondent-Appellee.	)

Before: T.G. NELSON, Circuit Judge.

Appellee's "Motion to Extend the Stay of Mandate is GRANTED. The mandate is stayed through December 28, 1997.

FILED
OCT 29 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON, Warden,	)
	)
Respondent-Appellee.	)
	)

Before: T.G. NELSON, Circuit Judge.

Appellee's "Motion to Recall and Stay the Mandate" is DENIED as moot as to Appellee's request to recall the mandate. Appellee's request to stay the mandate pending a petition for a writ of certiorari to the Supreme Court is GRANTED, in part. The mandate is stayed for thirty days from the date of this order unless further extended for cause shown. Rule 41(b), F.R.A.P.

FILED
OCT 29 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-99014
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) AMENDED ORDER
	)
ARTHUR CALDERON,	)
Warden,	)
	)
Respondent-Appellee.	)
	)

Before: PREGERSON, WIGGINS, and T.G. NELSON, Circuit Judges.

Appellee's Petition for Rehearing is DENIED.

FILED
OCT - 7 1997
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVIE LAMAR FILEDS,	) No. 96-80292
	) D.C. No. CV-92-00465-DT
Petitioner-Appellant	)
	)
v.	) ORDER
	)
ARTHUR CALDERON, Warden,	)
	)
Respondent-Appellee.	)
	)

Before: PREGERSON, WIGGINS, and T.G. NELSON, Circuit Judges.

Appellee's Petition for Rehearing is DENIED.

APPENDIX E

Part 6

Former §2254, State custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of the State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the court of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal Court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) That the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly supported such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal Court proceeding.

Supreme Court, U.S.
FILED
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(2)

No. 97-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ARTHUR CALDERON, Warden,

Petitioner,

vs.

STEVIE LAMAR FIELDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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25 pp

QUESTIONS PRESENTED

1. Are established state procedural default rules "inadequate" simply because courts in certain cases deviate from the rule in order to secure justice?

2. Should the federal courts adopt such a restrictive view of the adequacy of state procedural bars that states are encouraged to adopt severe, rigid, exceptionless rules?

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IN THE

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OCTOBER TERM, 1997

ARTHUR CALDERON, Warden,

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STEVIE LAMAR FIELDS,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

California's *Dixon* rule guarantees the efficient and timely resolution of an appellant's claims. The Ninth Circuit's refusal to respect this rule in the present case has needlessly delayed

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

Both parties have given written consent to the filing of this brief.

enforcement of the state's death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

SUMMARY OF FACTS AND CASE

Twenty years ago, Stevie Lamar Fields engaged in what the California Supreme Court described as a "one-man crime wave." *People* v. *Fields*, 35 Cal. 3d 329, 336, 673 P. 2d 680, 683 (1983). The spree, which occurred during the three weeks after his parole from prison,[2] resulted in convictions for

> "the following offenses: the robbery murder of Rosemary C., with the special circumstance of willful, deliberate, and premeditated murder during the commission of a robbery; the robbery of Clarence G.; the kidnaping for robbery and forced oral copulation of Cynthia S.; the kidnaping for robbery and robbery of Gwendolyn B., as well as rape, forcible oral copulation, and assault with a deadly weapon on Gwendolyn; the kidnaping, robbery, forcible oral copulation, and rape of Colleen C." *Ibid.*

A jury returned a verdict of death on July 12, 1979. See Pet. for Cert. 3. On direct appeal, the California Supreme Court affirmed Fields' sentence and conviction. *Fields*, *supra*, 35 Cal. 3d, at 374, 673 P. 2d, at 709, cert. denied, 469 U. S. 892 (1984). Fields filed a state habeas petition, amended it and eventually was denied relief in 1990. *In re Fields*, 51 Cal. 3d 1063, 800 P. 2d 862 (1990), cert. denied, 502 U. S. 845 (1991).

Fields then began proceedings in the federal courts. He was not there very long though. His first petition as amended was stayed while Fields exhausted all of his state claims. *Fields* v. *Calderon*, 125 F. 3d 757, 759 (CA9 1997). Upon return to the state court, Fields was again denied relief on procedural default

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2. Fields had been in prison serving a sentence for manslaughter before his release. *Ibid.*

grounds. The court cited *In re Harris*, 5 Cal. 4th 813, 829, 855 P. 2d 391, 398 (1993) and *In re Dixon*, 41 Cal. 2d 756, 759, 264 P. 2d 513, 514 (1953) as authority to bar Fields' claims. See 125 F. 3d, at 759.

After his certiorari petition was denied by this Court, *Fields* v. *California*, 514 U. S. 1022 (1995), Fields returned to the District Court with a second amended petition. *Fields*, 125 F. 3d, at 759. The state moved to dismiss the petition due to the procedural default and a hearing was held. *Ibid.* The District Court, finding the *Dixon* rule an independent and adequate state ground to bar Fields' claims, dismissed all of Fields' defaulted claims. *Ibid.*

The Court of Appeals reversed. Because of "[t]he flexible application of the *Dixon*" rule and the "element of discretion" inherent in the rule, the Ninth Circuit concluded that the rule is not an adequate state ground to bar federal review of Fields defaulted claims." *Id.*, at 762, 764-765. The Ninth Circuit erroneously relied on the rule's allegedly "undefined exceptions" and their "inconsistent" application to defeat an adequate state ground.

SUMMARY OF ARGUMENT

The independent and adequate state grounds doctrine should secure the state's interest in enforcing its procedures while protecting the individual's federal rights. The Ninth Circuit's opinion, in the present case, undermines the state's interest and conflicts with the purpose behind the doctrine. The Ninth Circuit's misguided interpretation of this Court's disparate descriptions of adequacy permits departure from the basic rationale and requires this Court's guidance to develop a standard that will secure the doctrine's purpose.

The Ninth Circuit's rigid, unworkable standard for determining adequacy is in conflict with other circuits which allow for the "occasional act of grace." A degree of flexibility is needed to give real force to state procedural rules. Requiring

rigid standards, on the other hand, will only serve to induce the states "to make their rules draconian." Certiorari should be granted to resolve the conflict among the circuits and to establish a workable standard for the circuits.

ARGUMENT

I. The Ninth Circuit's structured treatment of the adequacy determination for the independent and adequate state grounds doctrine is in conflict with the purpose behind the doctrine.

A. Supreme Court Precedent.

Under the independent and adequate state grounds doctrine, a state court decision prevents review of a federal question when it "rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U. S. 722, 729 (1991). The doctrine bars consideration of federal claims raised by a petition for habeas corpus, as well as on direct appeal, regardless of the fact that on federal habeas review the doctrine is "not technically jurisdictional." [3] *Lambrix* v. *Singletary*, 520 U. S. ___, 137 L. Ed. 2d 771, 783, 117 S. Ct. 1517, 1522 (1997). The same standard is applied to both types of claims because if it was not applied to habeas corpus "a federal district court or court of appeals would be able to review claims that this Court would not have been able to consider on direct review." *Id.*, at 784, 117 S. Ct., at 1523. This would result in the state prisoner receiving "an end run around the limits of this Court's jurisdic-

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3. "[W]hen a federal court considers a state prisoner's petition for habeas corpus pursuant to 28 U. S. C. § 2254 . . . the federal court is not formally reviewing a judgment, but is determining whether the prisoner is 'in custody in violation of the Constitution or laws or treaties of the United States.' " *Lambrix* v. *Singletary*, 520 U. S. ___, 137 L. Ed. 2d 771, 783, 117 S. Ct. 1517, 1522 (1997).

tion and a means to undermine the State's interest in enforcing its laws." *Coleman*, 501 U. S., at 731.

The two prongs of the independent and adequate state grounds doctrine should secure the state's interest in enforcing its procedures while protecting the individual's federal rights. 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4027, p. 386 (2d ed. 1996). Justice Holmes captured the essence of the independent and adequate state grounds rule long ago. "Whatever springes the state may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, *when plainly and reasonably made*, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U. S. 22, 24 (1923) (emphasis added); see also *James* v. *Kentucky*, 466 U. S. 341, 349 (1984) (quoting *Davis*). However, the Ninth Circuit's use of rigid guidelines to determine adequacy undermines the state's interest and needs to be corrected by this Court. Because the many descriptions of adequacy, see *post*, at 7-8, have skewed the rationale behind the doctrine and led to this erroneous result in the Ninth Circuit, a clear statement from this Court as to the appropriate approach is needed.

This Court's precedent demonstrates that the determination of adequacy primarily depends on the petitioner receiving fair notice of the state procedural rule's existence. The Court consistently holds inadequate rules that trap, mislead, or deceive the defendant into failing to assert his federal right at the time or in the manner which the state court later determines was the required time or the required manner. See, *e.g.*, *Ford* v. *Georgia*, 498 U. S. 411, 424 (1991) (retroactive application of new procedural rule); *Johnson* v. *Mississippi*, 486 U. S. 578, 587-588 (1988) (state supreme court had expressly stated that collateral review, not sentencing and appeal, was proper forum for attacking priors); *NAACP* v. *Alabama ex rel. Flowers*, 377 U. S. 288, 297 (1964) (rule going only to form, not substance, applied with "pointless severity," unlike prior applications); *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 457

(1958) ("petitioner could not fairly be deemed to have been apprised of [the rule's] existence").

A recent decision by this Court demonstrates its reliance on fair notice as the determining factor of the adequacy of state rules to bar federal claims. In *Reich* v. *Collins*, 513 U. S. 106, 110 (1994), this Court addressed "whether it was proper for the Georgia Supreme Court to deny Reich relief on the basis of Georgia's predeprivation remedies" for unlawful taxes. The Court recognized that the state, in accord with due process principles, could provide either predeprivation, postdeprivation or a hybrid remedial scheme so long as it was "clear and certain." *Id.*, at 110-111. However, the Court also explained that "[w]hat a State may *not* do, and what Georgia did [in *Reich*], is to reconfigure its scheme, unfairly, in *mid-course*—to 'bait and switch,' . . . ." *Id.*, at 111 (emphasis in original).

This Court was particularly concerned with the taxpayer's ability to determine and reasonably seek the remedy available from the Georgia statute. *Ibid.*; see also Ga. Code. Ann. § 48-2-35(a) (Supp. 1997). These concerns were demonstrated by the factors relied on by the Court to conclude that "Georgia held out what plainly appeared to be a 'clear and certain' postdeprivation remedy." *Reich*, 513 U. S., at 111. First, the Court recognized that the average taxpayer reading the statute's "sweeping language" would not think that Georgia's predeprivation remedies were "the *exclusive* remedy for unlawful taxes." *Ibid.* (emphasis in original). Second, the Court concluded that none of the Georgia Supreme Court cases applying the statute before Reich's first appearance before the Georgia Supreme Court "put any limiting construction on the statute's sweeping language." *Id.*, at 112. Finally, the Court found it particularly relevant that "States ordinarily *prefer* that taxpayers pursue only postdeprivation remedies." *Ibid.* (emphasis in original). Each factor is concerned with the taxpayer's ability to determine the appropriate procedure for seeking relief and ensuring that taxpayers will not be unfairly precluded from receiving relief.

While never explicit as to its application of the independent and adequate state grounds doctrine, the Court made, for present purposes, a compelling analogy. By explaining that *Reich* "bears a remarkable resemblance to *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449 (1958) (Harlan, J.)," this Court made a significant step towards the appropriate standard for the adequacy determination. 513 U. S., at 112. *Patterson* stands for "the proposition that novel procedural requirements cannot be interposed to bar consideration of federal claims" thereby ensuring that a petitioner has a fair opportunity to present his federal claims. See *Patterson*, *supra*, 357 U. S., at 457-458; 16B Wright, Miller & Cooper, *supra*, § 4027, at 387. The Court's analogy reaffirms what is implicit in its prior holdings: the adequacy of the relevant state rule is secured by giving fair notice of the rule's existence and applying the rule reasonably.[4]

To secure this basic rationale, the Court has described the test for adequacy in a variety of ways. For example, *Davis*, *supra*, 263 U. S., at 24-25 explained that "unreasonable obstacles" created by the state rule could not be used to prevent review of federal claims. While in *Staub* v. *City of Baxley*, 355 U. S. 313, 320 (1958) the Court explained that an "arid ritual of meaningless form" would not bar federal review. *Patterson*, *supra*, 357 U. S., at 457 asserted that if the very existence of the rule at the time of the default is so unclear that "petitioner could not fairly be deemed to have been apprised of [the rule's] existence," then the rule cannot be the basis for default. There is also the test that originated in *Barr* v. *City of Columbia*, 378 U. S. 146, 149-150 (1964), which explained that unless a state procedural rule is "strictly or regularly followed," it will not be an adequate ground to bar federal review. See *Johnson*, *supra*,

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4. Interpretations of Supreme Court precedent have also explained "that state procedure may be followed so long as it affords a reasonable opportunity to assert federal rights." 16B Wright, Miller & Cooper, *supra*, § 4028, at 404.

486 U. S., at 587.[5] Finally, there is the test forming the basis for the Ninth Circuit's unforgiving application of adequacy: a state rule "must have been 'firmly established and regularly followed' by the time as of which it is to be applied" to be deemed adequate. *Ford*, *supra*, 498 U. S., at 424 (quoting *James*, *supra*, 466 U. S., at 348-349); *Fields* v. *Calderon*, 125 F. 3d 757, 760 (CA9 1997).

In each of these disparate descriptions, the basic rationale can be found. However, until this Court clarifies the appropriate course for the circuits, misguided applications of this language will lead to inconsistent results among the circuits and create further departures from this Court's precedent. The factors relied upon in the *Reich* opinion captured the essence of the rule Justice Holmes described so long ago. These factors, however, are in stark contrast to the factors relied upon in the Ninth Circuit to determine adequacy. The Ninth Circuit's holding in the present case offers this Court the opportunity to make explicit what the *Reich* opinion clearly implied.

B. The Ninth Circuit.

The Ninth Circuit does not adhere to the basic rationale behind the independent and adequate state grounds doctrine. It uses a narrow reading of the "firmly established and regularly followed" test to defeat an adequate state ground. Indeed, in the words of this Court in *Flowers*, *supra*, 377 U. S., at 297, it is the Ninth Circuit that has applied a rule with "pointless severity." This error can only be corrected by this Court and warrants the granting of certiorari. See Supreme Court Rule 10(c).

The Ninth Circuit concluded that "the *Dixon* rule [was] not an adequate state ground to bar federal review of Fields'

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5. Wright, Miller, and Cooper describe this test as adding a "new source of uncertainty . . . seeming to undercut the role of discretion in state procedure." 16B Wright, Miller & Cooper, *supra*, § 4028, at 394. Undercutting state discretion is the exact result the Ninth Circuit's unforgiving structure of adequacy is having even though it is based on this Court's "regularly followed" language. See *supra*, at 10.

defaulted claims." *Fields*, *supra*, 125 F. 3d, at 765. The *Dixon* rule was not a recent development; it had been in existence since 1953. *In re Dixon*, 41 Cal. 2d 756, 264 P. 2d 513 (1953). In fact, the rule had been around for nearly three decades when petitioner appealed his conviction. See *People* v. *Fields*, 35 Cal. 3d 329, 673 P. 2d 680 (1983). As recognized by the Ninth Circuit, the rule did have exceptions. *Fields*, 125 F. 3d, at 763. The California Supreme Court, over the years, had recognized exceptions to the *Dixon* rule for 1) "fundamental constitutional error," 2) "lack of fundamental jurisdiction," 3) "acting in excess of jurisdiction," and 4) "change in the law." See *In re Harris*, 5 Cal. 4th 813, 829-841, 855 P. 2d 391, 398-407 (1993) (discussion of the exceptions to the *Dixon* and *Waltreus* rules);[6] *Fields*, 125 F. 3d, at 763. The Ninth Circuit relied on *In re Harris*' "lengthy discussion" of the *Dixon* and *Waltreus* rules to support its position that the rule had been inconsistently applied. *Fields*, 125 F. 3d, at 763 (quoting *In re Harris*, 5 Cal.4th, at 829, 855 P.2d, at 398).

The Ninth Circuit asserted that the discussion of the exceptions in *Harris* "explicitly acknowledged that [the Supreme Court of California's] application of the *Waltreus* and *Dixon* rules had become obscured . . . ." *Ibid.* The Ninth Circuit also relied on *In re Clark*'s description of California's habeas procedural rules as being " '*subject to undefined exceptions*' " that provide " '*no clear guidelines*' " to indicate when departure from the rule is warranted. *Ibid.* (quoting *In re Clark*, 5 Cal. 4th 750, 763, 768, 855 P. 2d 729, 737, 740 (1993)) (emphasis added in *Fields*).

However, as the opinion demonstrates, the exceptions can be easily summarized and classified into four distinct categories. Still, these established exceptions to the *Dixon* rule and the rule's long existence were not enough for the Ninth Circuit

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6. Although the issue in *Harris* involved the rule derived from *In re Waltreus*, 62 Cal. 2d 218, 397 P. 2d 1001 (1965), the *Harris* Court explained that its discussion also applied to the *Dixon* rule. See *In re Harris*, 5 Cal. 4th, at 825, n. 3, 855 P. 2d, at 395, n. 3; see also *Fields* v. *Calderon*, 125 F. 3d, at 762.

to deem it adequate. *Id.*, at 765. Because *Dixon* and its exceptions "includes an element of discretion," the Ninth Circuit requires that the "standards governing the exercise of discretion are firmly established and are consistently applied . . . ." *Id.*, at 762. Limiting its review to nine cases that dealt with the *Dixon* rule between 1973 and 1981, the Ninth Circuit concluded that the rule and its exceptions had not been consistently applied during that period. *Id.*, at 764.[7]

Proving the allegedly inconsistent application of the rule and its exceptions is the main focus of the Ninth Circuit's opinion. See *id.*, at 763-764. Notification of the rule's existence and its probable application to the present facts was not enough to satisfy the Court of the rule's adequacy. The Ninth Circuit's overreliance on consistency as a determining factor may stem from the "regularly followed" language found in *Ford*, *supra*, 498 U. S., at 424. However, this overreliance misconstrues the essence of the doctrine, one of fair notice and fair play. Deviations from established rules should not be a basis for concluding that the petitioner did not have fair notice of the rule's probable application. Further, requiring that exceptions have clearly identifiable boundaries is overly stringent and unworkable.

Allowing exceptions to destroy a rule's force as a procedural bar is not new to the Ninth Circuit. The holding in the present case rests on a string of erroneously decided cases originating with *Morales* v. *Calderon*, 85 F. 3d 1387 (CA9 1996). See *Calderon* v. *U. S. District Court* (*Hayes*), 103 F. 3d 72, 74 (CA9 1996); *Calderon* v. *U. S. District Court* (*Bean*), 96 F. 3d 1126, 1130 (CA9 1996). In *Morales*, the Court denied preclusive effect to Morales' default, concluding "that California's rule on timeliness was not 'clear, *consistently* applied, and well-established.' " 85 F. 3d, at 1393 (emphasis added).

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7. See also Pet. for Cert. 13-18 (discussing the problems with the use of this small sample of cases).

The *Morales* court's conclusion was based on three premises. First, the *Morales* court asserted that the timeliness standards were "uncertain" because they did not define "substantial" delay or criteria for determining "good cause." *Id.*, at 1391. Second, the Court relied on the California Supreme Court's acknowledgment in *Clark*, *supra*, 5 Cal. 4th, at 763, 768, 855 P. 2d, at 740, that the rule lacked clear criteria for *departure* from it. And, finally, the *Morales* court justified its decision based on the fact "that at the time [Morales'] case was litigated in the district court, the California Supreme Court had *denied* 35 habeas petitions filed three years or more after affirmance on direct appeal, and more than half of those denials had not been on grounds of untimeliness." 85 F. 3d, at 1391.

The Ninth Circuit's analysis in both *Morales* and *Fields* forms a sharp contrast with this Court's analysis in *Reich*. In *Reich*, this Court did not question the state's ability to structure a rule with "sweeping language." As the first two factors relied on by this Court illustrate, the *Reich* Court's only concern was whether the language put the individual on notice of the possibility of forfeiture if the individual did not follow certain procedures. See *supra*, at 6. Since the "sweeping language" could include the postdeprivation remedy, the Court did not allow the state's "bait and switch." See *supra*, at 6. In *Morales*, however, the rule puts the petitioner on notice that "substantial delay" without "good cause" for the delay could result in defaulted claims. See *supra*, at 10-11. Similarly, in *Fields*, the petitioner could anticipate the *Dixon* rule's application to bar his claims unless he could prove a lack of jurisdiction, a change in the law, or a fundamental error. See *supra*, at 9. These rules may be flexible and make room for the "occasional act of grace." However, the rule's sweep does not diminish the petitioner's notice of its existence. Furthermore, these rules have not been changed in "mid-stream" to strip petitioner of his remedy. The state is simply playing by the rules it established.

Notice of the rule's existence does not play a true part in the Ninth Circuit's analysis. The second factor relied on by the

Morales and *Fields* courts demonstrates this point further. The *Morales* court defeats the timeliness rule based on the fact that the exceptions to the rule were not clearly defined. In *Fields*, the exceptions likewise defeated the *Dixon* rule. The exceptions do not change the fact that the rule may be applied to the petitioner's claims, that he had notice of this possible application, and that he could have prevented this possible application. The Ninth Circuit instead requires sharply defined standards that allow the court to look over the state's shoulder to see if it is applying its own rule correctly. If the rule is not sufficiently structured, it is deemed "inadequate." This Court has never required that state procedural rules be so stringently defined as the Ninth Circuit now requires. The mere fact that the Ninth Circuit has no way of knowing whether the California Supreme Court is exercising its discretion in a principled manner, see *Morales*, 85 F. 3d, at 1392, is enough to toss out the state rule.

This Court looks at the big picture.[8] The Ninth Circuit limits its analysis to the fine details and limited surveys of cases to defeat adequate state rules.[9] The Ninth Circuit's analysis clearly misconstrues the independent and adequate state grounds doctrine's purpose. The analysis is not concerned with whether the petitioner actually received fair notice of a procedural rule and is not trying to prevent an unfair "bait and switch" by the state. This departure from the true essence of the doctrine needs to be corrected.

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8. See *supra*, at 6 (discussing the third factor relied on by the *Reich* Court).

9. See *supra*, at 11 (discussing the *Morales* court's third justification for its decision); see also Pet for Cert. 13-18 (discussing the Ninth Circuit's limited review of *Dixon* cases).

II. The Ninth Circuit's test for determining the adequacy of state procedural rules creates a conflict which requires this Court's resolution.

A case is appropriate for review on certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . . ." Supreme Court Rule 10(a). In developing guidelines to determine whether a state rule is "firmly established," "strictly or regularly followed," or creates an "unreasonable obstacle," the circuits have come to varied results. The various descriptions of adequacy, see *supra*, at 7-8, can support each of these determinations, thus allowing for this disparate treatment. The Ninth Circuit has departed from this Court's basic rationale, see *supra*, at 9-10, while other circuits have adhered to the true spirit of this Court's precedent in applying the adequacy bar. These conflicts can only be corrected by this Court and make this an appropriate case to review on certiorari.

A. Degree of Flexibility Acceptable.

The Fifth Circuit has explained that "an occasional act of grace" by a state court does not disqualify a state rule as an adequate ground to procedurally bar a habeas claim. *Amos* v. *Scott*, 61 F. 3d 333, 342 (CA5 1995). This test recognizes that the "element of discretion," so troubling to the Ninth Circuit, does not defeat the petitioner's notice of the rule's existence and does not render a rule inadequate in the Fifth Circuit.

The state rule at issue in *Amos* was Texas' contemporaneous objection rule. The rule had been in existence since 1972 and had been applied in a "myriad" of cases. *Id.*, at 340. To prevent injustice caused by the imposition of Texas' contemporaneous objection rule, Texas courts had developed "two recognized exceptions—the 'right not recognized' exception and the 'fundamental error' exception . . . ." *Id.*, at 343. The Texas courts had also deviated from the rule in the " 'interest of justice'. . . ." *Id.*, at 340. In spite of these deviations, the

federal district court relied on the rule "as an 'independent and adequate state-law ground'" to bar federal review of Amos' claim "that the totality of circumstances surrounding his trial violated his Sixth Amendment right to a fair trial." *Id.*, at 337.

Amos, however, claimed that the rule and its exceptions were neither "strictly nor regularly followed" in Texas. *Id.*, at 338. Amos relied on three arguments to support his claim that the rule was not adequate to bar federal review. First, he relied on the cases where the courts failed to comply with the rule " 'in the interest of justice.' " *Id.*, at 340. Second, he argued "that a failure to apply, consistently and rationally, recognized *exceptions* to a procedural default rule will render the larger procedural rule an inadequate state law ground in *all* cases." *Id.*, at 343 (second emphasis added). Finally, he claimed that because the rule is "inherently discretionary" it is *per se* inadequate. *Id.*, at 345. Neither the flexibility of the rule and its exceptions nor the deviations from the rule and its exceptions persuaded the *Amos* court that the rule had not been regularly followed. *Ibid.*

Citing *Dugger* v. *Adams*, 489 U. S. 401, 410, n. 6 (1989), the Fifth Circuit explained that the concept of adequacy had been defined as including "a state procedural ground that is strictly or regularly applied *evenhandedly to the vast majority of similar claims.*" *Amos*, 61 F. 3d, at 339 (emphasis in original). Amos' attempt to discredit the "rule in its entirety," *id.*, at 340, by relying on exceptions made for "dissimilar claims," failed because the Court was "unwilling to set such an arbitrarily Draconian trap for the unwary" state courts. *Id.*, at 341, n. 24.

In contrast, the Ninth Circuit has set such a trap. Like Texas' contemporaneous objection rule, the *Dixon* rule was not a new development in the law. See *supra*, at 9. Likewise, the California Supreme Court had recognized exceptions to the *Dixon* rule over the years. See *supra*, at 9. These exceptions were similar to the exceptions recognized in the *Amos* court. *In re Harris*, 5 Cal. 4th 813, 829, 855 P. 2d 391, 398 (1993)

("fundamental constitutional error" exception); cf. *Amos*, *supra*, 61 F. 3d, at 343 (" 'fundamental error' exception"). However, unlike the Fifth Circuit, the Ninth Circuit concluded that the rule was not an adequate state ground to bar federal review. *Fields* v. *Calderon*, 125 F. 3d 757, 763 (CA9 1997). The Ninth Circuit's concern over having absolute boundaries for state procedural rules and their exceptions allowed it to overlook the "overall regularity and consistency" of the rule's application in most cases. Cf. *Amos*, 61 F. 3d, at 345.

The Ninth Circuit's reliance on flexible exceptions applied to "dissimilar claims" to defeat a state procedural rule is in stark contrast to the *Amos* opinion. The *Amos* court allowed state procedural rules and their exceptions to have a certain degree of flexibility in order to secure justice. *Ibid.* The Ninth Circuit, on the other hand, demands the development of "clear guidelines" that are applied "consistently" to all claims, similar or not.

Like the Fifth Circuit, other circuits have also given state procedural rules this required degree of flexibility. In *Duvall* v. *Purkett*, 15 F. 3d 745, 747 (1994), the Eighth Circuit had no problem with a state rule creating an exception for "manifest injustice," noting that it was similar to rules applicable in federal courts. In *Prihoda* v. *McCaughtry*, 910 F. 2d 1379, 1381 (CA7 1990), even though the state rule permitted exceptions for "sufficient reason," the inevitable uncertainty in application was not enough to defeat the rule's adequacy. *Id.*, at 1385.[10] The Tenth Circuit in *Andrews* v. *Deland*, 943 F. 2d 1162, 1190 (1991), and the Third Circuit in *Banks* v. *Horn*, 126 F. 3d 206, 211 (1997) have adopted *Amos*' standard holding that "an occasional act of grace" does not disqualify a state rule. None of these circuits have held that the state must establish "reasonable operating limits" for the dispensation of grace that the Ninth Circuit now requires as illustrated by the *Fields* and *Morales* line of cases.

---

10. See part II B, *post*, at 16-18 (further discussion illustrating how the *Prihoda* decision conflicts with the Ninth Circuit).

B. The Cost of Conflict.

Throughout the country, states are in the process of reshaping their procedural default rules. The reshaping may be in the form of case law, as in California under *In re Clark*, 5 Cal. 4th 750, 855 P. 2d 729 (1993) or by legislation. See, *e.g.*, Tex. Code Crim. Proc. Ann., Art. 11.071, § 5 (Vernon's Supp. 1998). In formulating these rules, state courts and legislatures need to know how much latitude for "occasional acts of grace" can be allowed before a state rule will be rendered a virtual nullity and every barred claim will have to be litigated in federal court. The split between the Ninth Circuit and the other circuits leaves that question up in the air.

"A requirement of consistency poses special problems for forfeiture rules, because every state uses exceptions such as 'plain error' or 'sufficient reason' or even 'cause and prejudice' to deal with cases in which application of the ordinary rules would produce unacceptably harsh consequences." *Prihoda, supra*, 910 F. 2d, at 1383.

> "Searching for 'regularity' in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and the inferior courts respect state procedural grounds unless they are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*). A state ground that is solidly established will be respected even though not 'strictly' followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interest of federalism would be served by such a development." *Id.*, at 1384 (emphasis in original).

Prihoda claimed that the fact that he was unrepresented in his first collateral attack was "sufficient reason" to consider a second, *id.*, at 1381, and claimed inconsistency in the Wisconsin courts' acceptance of that reason in some cases and rejection of it in others. *Id.*, at 1384. The Seventh Circuit rejected that argument, noting that other factors, such as the importance of the issue, were also involved. *Ibid.* Case-by-case judgment is required to implement such a rule.

> "The difficulty of drawing lines, especially under standards such as 'sufficient reason,' makes uncertain application inevitable. Uncertainty is not enough to disqualify a state's procedural ground as one 'adequate' under federal law. *If it were, states would be induced to make their rules draconian rather than to allow prisoners the latitude now available.*" *Id.*, at 1385 (emphasis added).

The opinions of the Ninth Circuit in the present case and in *Morales* stand in stark contrast to the wisdom of *Prihoda*. In the present case, the *Dixon* rule's development over the four decades of its existence allowed for some latitude. See *supra*, at 9. This flexibility, however, proved fatal in the case below as it was used as the basis for the rule's inadequacy. *Fields*, *supra*, 125 F. 3d, at 762-764; see also *supra*, at 9. In *Morales*, instead of recognizing the need for standards such as "good cause" and the benefits to prisoners of having them, the opinion begins by criticizing California's rule for not "set[ting] out criteria for determining 'good cause' to excuse such delay." *Morales* v. *Calderon*, 85 F. 3d 1387, 1391 (CA9 1996). The *Morales* court further explains that "[t]he vagueness of the Standards could have been *cured by narrowing judicial construction* in the years immediately following their issuance. We find no such cases, however." *Ibid.* (emphasis added). This concept is lifted straight from the cases on vagueness of statutes defining crimes or establishing eligibility for capital punishment. See, *e.g.*, *Richmond* v. *Lewis*, 506 U. S. 40, 46-47 (1992); *Kolender* v. *Lawson*, 461 U. S. 352, 355 (1983). The Ninth Circuit apparently believes that a rule granting *leniency*

to a litigant who has defaulted his claim must be drawn with the same precision as a law which *sends* people to the gallows.

The Ninth Circuit does acknowledge the value of discretionary rules, but then implies that only certain kinds of discretion will do. See *Fields*, *supra*, 125 F. 3d, at 762. Unless the state court establishes a body of case law laying out guidelines for the exercise of discretion, the Ninth Circuit will not find the requirement for an "adequate" state ground to have been met. *Ibid.* Because the California Supreme Court, like this Court, typically does not write opinions when it denies original habeas petitions, see *Morales*, *supra*, 85 F. 3d, at 1392, that requirement is not going to be met.

In effect, the Ninth Circuit has created a presumption of irregularity, inverting the usual rule. Cf. *Parke* v. *Raley*, 506 U. S. 20, 29 (1992) ("presumption of regularity" "deeply rooted in our jurisprudence"). Not only must the procedural ground be stated in the individual case, as *Harris* v. *Reed*, 489 U. S. 255, 263 (1989) may require, but the California Supreme Court must now write opinions in *all* of its original habeas petitions so that the Ninth Circuit can "peer majestically over the [state] court's shoulder," *Lewis* v. *Jeffers*, 497 U. S. 764, 780 (1990) (quoting *Godfrey* v. *Georgia*, 446 U. S. 420, 450 (1980) (White, J., dissenting)), and supervise its application of *state* law.

The Seventh Circuit applies the opposite presumption. The general rule is that state procedural grounds will be respected. To breach this wall, the burden is on the habeas petitioner to show that the state rules "are regularly *dis*regarded (or seemingly have been manufactured for the occasion, as in *Johnson*)." *Prihoda*, *supra*, 910 F. 2d, at 1384 (emphasis in original).

This issue has always been important. It is even more important now, after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. The conflict among the circuits and the Ninth Circuit's departure from Supreme Court precedent make this an appropriate case for review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

April, 1998

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON,

Petitioner,

v.

STEVIE LAMAR FIELDS,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

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Petitioner,

v.

STEVIE LAMAR FIELDS,

Respondent.

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 39 of the Rules of the United States Supreme Court, the respondent, Stevie Lamar Fields, requests leave to proceed in this matter in forma pauperis and to file the accompanying brief in opposition to the petition for writ of certiorari without payment of costs. Mr. Fields is indigent and presently housed on California's death row at San Quentin State Prison. The undersigned counsel were appointed to represent Mr. Fields in July, 1992, in his federal habeas corpus proceedings initiated under 28 U.S.C. § 2254,

pursuant to 18 U.S.C. § 3006(A) and Local Rule 26.8.4(a) of the Local Rules for the United States District Court of the Central District of California.

Mr. Fields previously was granted permission to proceed in forma pauperis in California state appellate and habeas corpus proceedings regarding his conviction of murder and resulting death sentence, and similarly was granted permission to proceed in forma pauperis in his federal habeas corpus proceedings relating thereto in the United States District Court for the Central District of California and in the United States Court of Appeals for the Ninth Circuit.

Dated: April 9, 1998

Respectfully Submitted,

CARLSMITH BALL

By: _____

David S. Olson
Attorneys for Respondent
Stevie Lamar Fields

NO. 97-1262

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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(CAPITAL CASE)

RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

Was California's procedural default "Dixon rule" for failure to raise a claim on appeal adequate as of the time of Fields's appeal in 1981 so as to bar federal review of habeas corpus claims procedurally defaulted under such rule?

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OPINIONS BELOW

The opinion of the United States Court of Appeals is reported at 125 F.3d 757 (9th Cir. 1997) and attached as Appendix A to the petition for writ of certiorari. The United States District Court opinion is not published and is attached as Appendix B to the petition.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent Stevie Lamar Fields ("Fields") was convicted of murder and sentenced to death in the Superior Court of California, County of Los Angeles, in 1979. This action involves his federal petition for writ of habeas corpus pursuant to 28 U.S.C. section 2254.

STATEMENT OF THE CASE

Fields's conviction and death sentence were upheld on appeal by the California Supreme Court. People v. Fields, 35 Cal.3d 329, 197 Cal. Rptr. 803, 673 P.2d 680 (1983), cert. den., 469 U.S. 892 (1984). Fields then filed a petition for a writ of habeas corpus in the California Supreme Court on December 4, 1984, which petition was amended on August 26, 1985 (the "Initial State Habeas Petition"). The California Supreme Court denied the Initial State Habeas Petition. In re Fields, 51 Cal.3d 1063, 275 Cal. Rptr. 384, 800 P.2d 862 (1990), cert. den., 502 U.S. 845 (1991).

On May 25, 1993, Fields filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California ("District Court") and then filed an amended petition in the District Court on August 2, 1993.

The petitioner herein, Arthur Calderon ("Calderon"), filed a motion to dismiss the amended habeas petition. In ruling on that motion, the District Court found certain claims in the amended habeas petition to be unexhausted, and provided Fields with an opportunity to present the unexhausted claims to the California Supreme Court. Fields thus filed a second petition for writ of habeas corpus in the California Supreme Court on January 14, 1994 (the "Exhaustion Petition"). The California Supreme Court denied the Exhaustion Petition by its order of October 14, 1994, which is attached as Appendix C to Calderon's subject petition for writ of certiorari (the "Petition"). As pertinent herein, that order provides:

> "The following claims are denied on the procedural ground of untimeliness, in that they could have been, but were not, raised on appeal or in the first habeas petition: the claims set forth in parts IX(A, B, E, F, G), X(B, C, F, G, H, b, XV, XVIII, XXI (as to the claim relating to the instruction on suppression of evidence), XXIII, XXIV, XXV, XXVI, XXX, XXI. (In re Harris (1993) 5 Cal. 4th 813, 829; In re Dixon (1953) 41 Cal. 2d 756, 759.)"[1]

Pursuant to the order of the District Court, Fields filed his second

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[1] In In re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953), the California Supreme Court held that "habeas corpus cannot serve as a substitute for an appeal, and, in the absence of special circumstances . . . the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal." Similarly, in In re Harris, 5 Cal. 4th 813, 829, 855 P.2d 391 (1993), the California Supreme Court stated, "an unjustified failure to present an issue on appeal will generally preclude its consideration in a postconviction petition for a writ of habeas corpus." Thus, the citations to Dixon and Harris only reference California's default for failure to raise a claim on appeal (hereinafter "the Dixon default" or "the Dixon rule").

amended petition for writ of habeas corpus in the District Court on March 21, 1995 (the "Second Amended Petition"). On July 31, 1995, Calderon filed a "Motion to Dismiss Claims Barred by State Procedural Default in Second Amended Petition for Writ of Habeas Corpus" (the "Motion to Dismiss"), contending that various of the claims asserted by Fields in the Second Amended Petition are barred from federal review because they were procedurally defaulted by the California Supreme Court's October, 1994 order. Fields opposed the Motion to Dismiss, contending, among other things, that the procedural rules invoked by the California Supreme Court are not adequate and independent so as to bar federal review of the defaulted claims.

The District Court, by its order entered June 12, 1996, granted the Motion to Dismiss and dismissed all or part of eleven of the claims alleged by Fields in the Second Amended Petition, holding that "at the time [Fields] defaulted on his state court claims, the Dixon rule was regularly and consistently applied." Petn., App. B, p. 6. The District Court also ordered the parties to brief issues relating to cause and prejudice as to the default, and whether a fundamental miscarriage of justice would result by a failure to consider the defaulted claims. Id. at 8.

On June 27, 1996, Fields filed in the District Court a "Motion for Reconsideration of Court's Order of June 12, 1996 or, in the Alternative, for Certification of Such Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b) and F.R.A.P. 5(a)." The District Court, by its order entered July 30, 1996, denied Fields's Motion for Reconsideration, but granted the motion for certification of the June order for interlocutory appeal, and also stayed further proceedings at the District Court level.

The Ninth Circuit granted Fields permission to file an interlocutory appeal. After briefing and oral argument, the Ninth Circuit, in Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997) ("Fields"), a unanimous opinion authored by Judge Thomas G. Nelson, held that California's Dixon rule was not adequate as of 1981 so as to bar federal review of claims defaulted under that rule. The Ninth Circuit did not address Fields's other contentions on appeal: that the District Court erred in granting the Motion to Dismiss without analyzing whether the Dixon rule is independent of federal law, and that the California Supreme Court's October 1994 order is too ambiguous to bar federal review of the defaulted claims. Fields, supra, 125 F.3d at 760, n.3. As such, the Fields holding is very narrow and the decision may affect only those California inmates who are seeking federal habeas corpus review of claims defaulted by the Dixon rule.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED UNDER RULE 10

Rule 10 of the Rules of the Supreme Court of the United States (the "Rules") sets forth various applicable factors regarding certiorari petitions, although neither controlling nor fully measuring the court's discretion. Calderon ignores Rule 10 because none of the factors favor this Court exercising jurisdiction in the instant case.

For example, the Fields decision does not conflict with any other United States Court of Appeals decision. (Rule 10(a).) As noted in Fields, the question of the adequacy of the Dixon default was one of first impression. Fields, supra, 125 F.3d at 761.[2]

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[2] In Calderon v. U.S. Dist. Ct. for the E.D. of Cal. (Hayes), 103 F.3d 72, 75 (9th Cir. 1996), cert. den., ___ U.S. ___, 117 S.Ct. 2532 (1997), the Ninth Circuit denied a mandamus (continued...)

Fields does not conflict with any decision by a state court of last resort. (Rule 10(a).) The California Supreme Court cannot directly decide whether the Dixon rule is adequate and independent so as to bar federal review of claims defaulted thereunder. See, e.g., Johnson v. Mississippi, 486 U.S. 578, 587 (1988). Nonetheless, recent observations by the California Supreme Court on the issue of the consistent application of California's procedural default rules fully comport with Fields. In re Clark, 5 Cal. 4th 750, 768, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993) (noting that California's rule against successive habeas petitions has been termed "discretionary" and is "subject to undefined exceptions"); In re Harris, supra, 5 Cal. 4th at 828-34 (noting that California's application of its procedural default rules had become obscured over the years and suggesting that it would more stringently apply the rules in the future).[3]

The Ninth Circuit in Fields did not depart "from the accepted and usual course of judicial proceedings." (Rule 10(a).) Finally, the narrow Fields decision did not decide an

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[2](...continued)
petition seeking to overturn a district court's order that the Dixon rule was not adequate and independent so as to bar federal review. Fields is also consistent with prior Ninth Circuit decisions holding that other California procedural default rules are not adequate to bar federal review. Siripongs v. Calderon, 35 F.3d 1308, 1318 (9th Cir. 1994), cert. den., 513 U.S. 1183 (1995) (California's rule against successive habeas petitions is not adequate and independent so as to bar federal review of claims defaulted under that rule); Morales v. Calderon, 85 F.3d 1387, 1393 (9th Cir. 1996), cert. den., ___ U.S. ___, 117 S.Ct. 500 (1996) (California's timeliness rules as to filing of habeas petitions are not adequate and independent so as to bar federal review).

[3] Calderon, in all his briefing below, strenuously urged that this case presented a "post-Clark" scenario but now contends that in Clark and Harris "the California Supreme Court was, at most, merely restating its longstanding default rules" (Petn. at 16) even while conceding at other times that the California Supreme Court deemed it necessary in Clark and Harris to "clarif[y] (and strengthen) existing California procedural default law." Petn. at 3.

important question of federal law that has not been, but should be, settled by this Court, nor does it involve an important federal question that conflicts with relevant decisions of this Court. (Rule 10(c).) In fact, Fields is based entirely upon precedent from this Court. For example, the Ninth Circuit relied upon three United States Supreme Court cases (Ford v. Georgia, 498 U.S. 411 (1991), James v. Kentucky, 466 U.S. 341 (1984), and NAACP v. Alabama ex. rel. Pattersen, 357 U.S. 449 (1958)) in confirming that the proper date on which to evaluate the adequacy of a procedural default rule is when the claim should have been raised. Fields, supra, 125 F.3d at 760. The Ninth Circuit also relied upon three United States Supreme Court cases in analyzing the adequacy of the Dixon rule (Coleman v. Thompson, 501 U.S. 722 (1991), Ford v. Georgia, supra, and Johnson v. Mississippi, supra). Fields, supra, 125 F.3d at 762-65.

In short, the factors set forth in Rule 10 demonstrate that there is no reason for this Court to grant the Petition. Moreover, as shown below, Calderon fails to set forth any other reason why the Petition should be granted.

II. SUMMARY OF ARGUMENT

Calderon does not and cannot contend that California's so-called Dixon rule was consistently applied in 1981 when Fields completed his briefing on appeal. Instead, he tries to rewrite both well-established federal law on procedural default and the Fields decision. For example, Calderon contends that the adequacy of the Dixon rule should be evaluated as of the time the default is subsequently invoked (here, in 1994), as opposed to when the default actually occurred (here, in 1981). Petn. at pp. 13-15. The Ninth Circuit, however, correctly rejected this contention. Following clear precedent from this Court, the Ninth Circuit

reiterated that the "relevant point of reference" for assessing the adequacy of a procedural default rule is when the litigant fails to comply with the rule, i.e., defaults under the rule, not the time when the default is subsequently invoked. Fields, supra, 35 F.3d at 760-61.

Second, to be adequate to bar federal review, a state procedural rule must be (1) clear, (2) firmly established, **and** (3) regularly followed at the time of the litigant's default. E.g., Henry v. Mississippi, 379 U.S. 443, 448 n. 3 (1965); Ford v. Georgia, supra, 498 U.S. at 423-24. The Ninth Circuit correctly held that the Dixon rule was not regularly followed in 1981. Fields, supra, 125 F.2d at 764-65. Calderon thus misses the point when he contends in response that because Dixon was **decided in 1953** the Dixon rule was thus "well-established" by 1981 and Fields was "on notice" of the rule in 1981 and had "a reasonable opportunity" to raise his claims then. E.g., Petn. at 13-15, 22-26. This contention ignores that it is not enough that the rule is an old one; a state procedural default rule must be consistently applied, however old it may be, to be adequate to bar federal review.

Finally, Calderon, in an apparent attempt to distract this Court from the simple issue decided in Fields, that opinion's narrow holding, and the propriety of that decision, resorts to numerous unfounded and extraneous attacks on the Ninth Circuit, for instance, accusing it of systematically dismantling California's procedural bars (Petn. at 7), and engaging in "mischief." Id. at 11. In this vein, Calderon contends the Ninth Circuit undertook a "predictably . . . seriously flawed" analysis of the application of the Dixon rule. Petn. at 22. Pejoratives aside, the Ninth Circuit engaged in a simple and sound analysis. In deciding whether California consistently applied the Dixon default as of 1981, the Ninth Circuit looked to the California cases. There, it saw that the California courts themselves repeatedly

acknowledged the discretionary nature of the Dixon rule, and also that they did not regularly apply it during the relevant time period. When the California courts state again and again that the so-called Dixon rule is only a discretionary policy, and acknowledge that the Dixon rule and other procedural default rules were not consistently applied during the relevant time period, then the Ninth Circuit should not be disparaged for following the mandates of federal procedural default law, including those laid down by this Court, and correctly holding that such a "rule" is not adequate to bar federal review.

III. ARGUMENT

A. A State's Procedural Default Rule Must be Adequate and Independent to Bar Federal Review

Federal courts are obligated to hear federal claims presented by a habeas corpus petition unless a prior state court decision denied relief relying upon a state procedural rule that is independent of federal law and adequate to support the judgment. Coleman v. Thompson, supra; Harris v. Reed, 489 U.S. 255, 260-62 (1989). To be independent of federal law, a state procedural rule must not depend "upon an antecedent determination of federal law." Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1992). To be adequate, the state procedural rule must be clear (Henry v. Mississippi, supra, 379 U.S. at 448 n.3), and "firmly established" and "regularly followed." James v. Kentucky, supra, 466 U.S. at 348-51.

A rule is "regularly followed" if it is applied in "the vast majority of cases." Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989). It is thus not enough that the procedural rule be firmly established if it is not also regularly followed—i.e., applied in the vast majority of cases. James v. Kentucky, supra, 466 U.S. at 348-49; Barr v. City of Columbia, 378 U.S. 146,

149 (1964) (procedural rule not adequate unless it is strictly or regularly followed); Siripongs, supra, 35 F.3d at 1318 ("federal courts should not insist upon a petitioner, as a procedural prerequisite to obtaining federal relief, complying with a rule the state itself does not consistently enforce").

A state procedural rule that is discretionary is inadequate to bar federal review. Williams v. Georgia, 349 U.S. 375, 389 (1955); Harmon v. Ryan, supra, 959 F.2d at 1461. Further, where a state court has failed to articulate the parameters within which it will exercise discretion to waive compliance with a procedural rule, the rule is not adequate. Gutierrez v. Moriarty, 922 F.2d 1464, 1470-71 (10th Cir. 1991), cert. den., 502 U.S. 844 (1991).[4]

B. The Default in this Case Occurred in 1981

Calderon, apparently recognizing the futility of attempting to establish the consistent application of the Dixon default as of 1981, instead argued below that the "trigger date" for the analysis should be 1994, when the California Supreme Court invoked the Dixon default in denying claims asserted in Fields's Exhaustion Petition. The Ninth Circuit, however, analyzed this issue in accordance with clear precedent from this Court and properly concluded that the "relevant point of reference for assessing" the adequacy of the Dixon rule is 1981, when the default occurred. Fields, supra, 125 F.3d at 760-61.

Calderon renews his contention in the Petition, asserting that "the proper trigger date for a consistency-of-application evaluation is 1994, the date when the California

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[4] Even where the state court decision is supported by an independent and adequate state ground, the federal court may still consider the claim if the petition demonstrates cause for the default and actual prejudice resulting from the alleged violation of federal law, or a fundamental miscarriage of justice. Harris v. Reed, supra, 489 U.S. at 262.

Supreme Court actually applied the Dixon rule and denied 11 claims contained in Fields's final state habeas corpus petition on procedural grounds." Petn. at 14. Calderon, however, does not, and cannot, cite a single case to support this contention. Instead, as the Ninth Circuit in Fields noted, fairness and clear precedent from this Court require that the adequacy of a procedural default rule be determined as of the time the underlying default occurred:

> "The Supreme Court of the United States has made it clear that a state's procedural rule used to bar consideration of a claim 'must have been "firmly established and regularly followed" by the time as of which it is to be applied.' [Citations to Ford v. Georgia, supra, 498 U.S. at 424, and James v. Kentucky, supra, 466 U.S. at 348.] In NAACP v. Alabama ex rel. Patterson, [supra, 357 U.S. at 457,] the Court refused to apply a state's procedural rule, because the defendant there could not be 'deemed to have been apprised of its existence.' In Ford, the Supreme Court said that applying the rule to Ford would 'apply a rule unannounced at the time of [Ford's] trial . . . .' Ford, 498 U.S. at 424, 111 S. Ct. at 857.
>
> . . . .
>
> Therefore, we examine whether the state courts were regularly and consistently applying the relevant procedural default rule 'at the time the claim should have been raised.' [Citation omitted.]
>
> With respect to the Dixon rule, we have held that a relevant point of reference for assessing its application is the time at which the petitioner 'had an opportunity to raise the claims on direct appeal.' [Citations omitted]. Because the Dixon rule precludes collateral review of a claim that could have been brought on direct appeal, the procedural default, though announced by the California Supreme Court when the habeas petition is denied, technically occurs at the moment the direct appeal did not include those claims that should have been

> included for review. In this case, that moment is 1981, the year of Fields' direct appeal." Fields, supra, 125 F.3d at 760-61.[5]

In Ford v. Georgia, supra, the Supreme Court of Georgia had procedurally defaulted a claim under Batson v. Kentucky, 476 U.S. 79 (1986), based on a state rule requiring such claims to be raised between the jurors' selection and their oath. The question in Ford v. Georgia was whether such rule was adequate and independent to preclude federal review of the Batson claim. Ford v. Georgia, supra, 498 U.S. at 418.

This Court noted that the Batson decision issued while the petitioner's first petition for writ of certiorari was pending before it (id. at 417), and that the state procedural rule requiring a Batson claim to be raised contemporaneously as the jury was selected was announced in State v. Sparks, 257 Ga. 97, 98, 355 S.E. 2d 658, 659 (1987), a year later. Ford v. Georgia, supra, 498 U.S. at 417-18.

This Court thus held that the Supreme Court of Georgia erred in ruling that the Sparks rule precluded consideration of the petitioner's Batson claim, stating:

> "The Supreme Court of Georgia's application of its decision in Sparks to this case before us does not even remotely satisfy the requirement of James [v. Kentucky, supra] that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been "firmly established and regularly followed" **by the time as of which it is to be applied**. **At the time of petitioner's trial**, Georgia's procedural law was just what it was when the Sparks defendant was tried . . . .

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[5] Calderon contends that the Ninth Circuit "patently confuse[ed] firm establishment with regularity of application," and thus "erroneously concluded that California's allegedly irregular application deprived Fields of notice." Petn. at 13. As above shown, this misstates the Ninth Circuit analysis. The Ninth Circuit simply noted that the requirement that the procedural default rule be adequate as of the time of the underlying default avoids the unfairness of applying a new rule retroactively and also gives the defendant and his counsel notice that the claims must be raised at that time. Fields, supra, 125 F.3d at 761.

> To apply Sparks retroactively to bar consideration of a claim not raised between the jurors' selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground within the meaning of James. . . . **Since the rule was not firmly established at the time in question**, there is no need to dwell on the further point that the state court's inconsistent application of the rule in petitioner's case and Sparks would also fail the second James requirement that the state practice have been regularly followed." Id. at 424-25 (emphasis added).

This Court, in Ford v. Georgia, thus clearly held that the time "as of which" the procedural bar "is to be applied" means the time when the underlying default occurred, for example, in the Ford v. Georgia case, "at the time of petitioner's trial," or here, when Fields failed to raise claims in his 1981 appeal. Calderon's contention that the procedural default here "was applied" in 1994 is thus erroneous and contrary to Ford v. Georgia.[6] Moreover, use of the 1994 date in this case, as Calderon urges, would condone a retroactive application of a state procedural rule to bar claims, a practice this Court strongly condemned in Ford v. Georgia. See also, NAACP v. Alabama, supra, 357 U.S. at 457 (state procedural rule of which petitioner was not apprised as of the time of seeking relief in the state court was not adequate and independent to bar federal review, even where it might appear "in retrospect" that the rule was consistently applied, because, based on prior state court opinions, the petitioner "could not fairly be deemed to have been apprised of its existence").

The adequacy of a state's procedural default rule must thus be determined as of the time the purported default occurred. The Ninth Circuit analysis in this regard was proper.

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[6] Calderon's reliance on Ford v. Georgia is misplaced because he simply assumes, incorrectly and contrary to that opinion, that the "time as of which" a procedural default is to be "applied" relates to the subsequent invocation of a procedural default. Petn. at 14.

Caldron's further contention that the Ninth Circuit position regarding this issue has changed or evolved from prior decisions (Petn. at 7-8, 15) is thus not relevant to determining the propriety of the instant Fields decision. Moreover, Calderon is in any event mistaken on this latter point as Morales v. Calderon, supra, and Siripongs v. Calderon, supra, do not support Calderon's contention that the "trigger" date for determining the adequacy of a procedural default is when the procedural rule is invoked, as Calderon suggests. Petn. at 7-8.

In Morales, the Ninth Circuit expressly noted that Clark was decided after all relevant events there had transpired, and also held that California's timeliness rules were not clear, consistently applied, and well-established **at any time** after Morales's convictions were affirmed (in 1989) and before he filed **his first** state habeas petition (in 1992). Morales v. Calderon, supra, 85 F.3d at 1393. In Siripongs, the Ninth Circuit also expressly noted that Clark was decided after all relevant events had transpired in Siripongs, so again there was no issue as to Clark's application. Siripongs v. Calderon, supra, 35 F.3d at 1318.[7]

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[7] As Calderon concedes, the analysis in Fields is in fact consistent with the analysis used by the Ninth Circuit in Calderon v. United States District Court for the E.D. of California (Bean), 96 F.3d 1126, 1130 (9th Cir. 1996), cert. den., ___ U.S. ___, 117 S.Ct. 1569 (1997), wherein the Ninth Circuit held that while the habeas petition in Bean leading to the procedural default order was filed in early 1994, after the Clark decision, there was "no dispute" that "the default [for untimeliness in Bean], if any, would have occurred before Clark was decided" because Bean's direct appeal was decided in 1988, and Hayes, supra, 103 F.3d at 72, wherein the Ninth Circuit rejected the respondent's argument that "even if Dixon was not consistently applied before Harris, it is fair to apply the Dixon bar to Hayes because Harris put Hayes on notice that he must justify any failure to raise claims on appeal or lose the ability to raise them on habeas review," stating: "Hayes' direct appeal ended before Harris was decided. Hayes had no notice that the Dixon bar would be consistently enforced **when he had an opportunity to raise the claims on direct appeal, the time at which the alleged default occurred**." Id. at 75 (emphasis added).

C. The Dixon Rule Was Not Regularly Applied as of 1981

Fields cited below myriad California cases to show that the California courts repeatedly referred to the Dixon rule as a discretionary policy and did not consistently apply the rule as of 1981. E.g., In re Wallace, 3 Cal. 3d 289, 292-93, 90 Cal. Rptr. 176 (1970) (quoting In re Black, 66 Cal. 2d 881, 887, 59 Cal. Rptr. 429 (1967) for the proposition that the Dixon rule is "merely a discretionary policy" and thus reaching the merits of habeas claims not fully exhausted on appeal); In re Coughlin, 16 Cal. 3d 52, 55, 127 Cal. Rptr. 337 (1976) (the "general rule" that habeas cannot serve as a second appeal "is primarily a discretionary policy which may be overlooked where 'special circumstances' are deemed to exist"); In re Antazo, 3 Cal. 3d 100, 107, 89 Cal. Rptr. 255 (1970) ("'exhaustion of the appellate . . . remedy . . . is merely a discretionary policy governing the exercise of the reviewing court's jurisdiction to issue'" a habeas corpus writ (citations omitted)); In re Clark, supra, 5 Cal. 4th 750, 768 (California's procedural default rules have been termed "discretionary" and are "subject to undefined exceptions"); In re Harris, supra, 5 Cal. 4th at 828-34 (California's procedural default rules became obscured over the years and are subject to a "number of exceptions," including "a wide-ranging 'fundamental constitutional rights' exception").[8]

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[8] Fields also contended that the Dixon rule was not adequate to bar federal review because the Dixon rule has never been clearly defined. The rule prohibits a petitioner from raising claims in habeas in the first instance where such claims could have been raised on appeal "in the absence of special circumstances." In re Dixon, supra, 41 Cal. 2d at 759. The California Supreme Court has never explained what "the special circumstances" might be, and recently declined to "clarify and limit the exceptions to" the Dixon rule. In re Clark, supra, 5 Cal. 4th at 768 n.8.

In discussing the California Supreme Court's decisions in In re Clark, supra, and In re Harris, supra, the Ninth Circuit stated:

> "The California Supreme Court could hardly have stated more clearly that the application of its procedural rules governing habeas petitions had become irregular and inconsistent. The opinions in In Re Clark and In Re Harris were intended to reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions." Fields, supra, 125 F.3d at 763-64.

Based on In re Clark and In re Harris, the Ninth Circuit thus correctly, and unremarkably, concluded that the Dixon rule was not adequate to bar federal review. Id. Calderon contends that the admissions made in In re Clark and In re Harris "are virtually indistinguishable" from what occurred in McCleskey v. Zant, 499 U.S. 467 (1991). Calderon is wrong. In McCleskey, this Court was addressing "the abusive petitions that in recent years have threatened to undermine the integrity of the habeas corpus process." Id. at 496. Fields does not concern an abuse of the writ situation as this action comprises Fields's first attempt to obtain federal review of his conviction and death sentence. Moreover, in McCleskey, this Court was, in its own words, simply attempting "to define the doctrine of abuse of the writ with more precision." Id. at 489. This Court was not addressing or concerned with the inconsistent application of a state procedural rule.

The Ninth Circuit further stated that the In re Clark and In re Harris decisions "do not answer the question of exactly when the Dixon rule and other rules had become irregular and inconsistently applied." Fields, supra, 125 F.3d at 764 (emphasis in orig). Because "Fields did not provide . . . a survey of cases to demonstrate the inconsistent application of the Dixon rule in 1981" the Ninth Circuit conducted its own survey. Id. As

above noted, however, Fields, while not proffering "a survey of cases," did cite **four cases** decided between 1967 and 1976 in which the California Supreme Court acknowledged the discretionary nature of the Dixon rule in California. These cases, along with the 1993 In re Clark and In re Harris opinions, do demonstrate the inadequacy of the Dixon rule as of the pertinent time. Indeed, Fields also relied on myriad federal cases which cited all or some of these California cases in concluding that California has not consistently applied its procedural default rules. E.g., Siripongs v. Calderon, supra, 35 F.3d at 1318 (holding, based on In re Clark, that California's rule against successive habeas petitions was not adequate and independent as of 1991 to bar federal review); Morales v. Calderon, supra, 85 F.3d at 1393 (holding, based on In re Clark, that California's habeas timeliness rules were not adequate and independent at any time between 1989 and 1992); Hayes, supra, 103 F.3d at 75 (holding that district court did not err in concluding that the Dixon rule was not consistently applied prior to In re Harris); Karis v. Vasquez, 828 F.Supp. 1449, 1467-68 (E.D. Cal. 1993) (stating that California decisions such as In re Wallace, supra, In re Black, supra, In re Coughlin, supra, and In re Antazo, supra, "have repeatedly held that [the Dixon rule] is merely a discretionary policy" and thus finding the rule not adequate to bar federal review); Odle v. Calderon, 884 F.Supp. 1404, 1413-14 (N.D. Cal. 1995) (concluding based on California Supreme Court decisions acknowledging the Dixon rule to be a discretionary policy that the Dixon rule was not adequate as of 1988 direct appeal to bar federal review).

The Ninth Circuit survey was thus not necessary. It does, however, provide even more support for the conclusion that the Dixon rule was not adequate at the time in question.

Calderon contends that the Ninth Circuit did not explain its methodology in conducting the survey of cases. Petn. at 5. In fact, the Ninth Circuit clearly set forth that methodology. The court noted that during the 1973-81 time period, "habeas petitions were initially filed in California Superior Court with rights of appeal to both the California Court of Appeal and the California Supreme Court. Therefore, published decisions from both of California's appellate courts are instructive as to how the Dixon rule was being applied." Fields, supra, 125 F.3d at 764. The Ninth Circuit further explained that it "eliminated the cases that cited the Dixon rule, but did not actually involve the possibility of the rule's application," and that it was "left with nine cases." Id.

The Ninth Circuit then analyzed those nine cases (not one of which Calderon cites in the Petition). As the Ninth Circuit explained, of the nine cases in which the Dixon rule could have been applied, only two cases actually applied the Dixon rule. Id. In the other cases, the rule was **not** applied to block consideration of claims. Id. Of the four applicable California Supreme Court cases, only one invoked the procedural rule to default claims, whereas three did not. Id.

Contrary to Calderon's suggestion, the Ninth Circuit did not simply mechanically "tote up" these cases. Petn. at 23. Instead, it determined if these cases reflected whether the California courts were consistently applying the Dixon rule and also analyzed the language of these cases to see what the California courts were saying about the Dixon rule in published decisions intended to set precedent. As the Ninth Circuit noted, the case of In re Fuller, 124 Cal. App. 3d 251, 177 Cal. Rptr. 233 (1981), "perhaps best represents the lack of

guidance the Dixon rule was providing by 1981." Fields, supra, 125 F.3d at 764. The Ninth Circuit noted that in Fuller the California court stated:

> "We shall determine the case on the merits. It is true that as a general rule habeas corpus cannot serve as a substitute for appeal. [Citing to In re Dixon, supra.] The rule yields, however, in special circumstances; courts do not always require the exhaustion of appellate remedies. [Citing to, inter alia, In re Black, supra.] Here, as in In re Black, supra, petitioner's continued confinement followed 'somewhat unique' developments and the issue he presents is jurisdictional. It is also apparently novel. We are thus disposed to consider it." Id. at 764, citing to In re Fuller, supra, 124 Cal. App. 3d at 254-55.[9]

The Ninth Circuit also quoted language from In re Duran, 38 Cal. App. 3d 632, 635, 113 Cal. Rptr. 442 (1974), in which the court noted that it "has discretion to issue the writ if it believes an appeal in not adequate, or if a prompt disposition is required in the interests of justice. [Citations omitted.]"[10]

Thus, the Ninth Circuit survey also demonstrates the inadequacy of the Dixon rule. Calderon does not even try to analyze the cases relied upon by the Ninth Circuit. Instead, he attacks the survey itself. For example, he suggests that the Ninth Circuit should not have undertaken the "independent survey" because the burden of proof purportedly is on Fields to establish the inadequacy of the Dixon rule. Petn. at 22. This contention is wrong.

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[9] The habeas challenge in Fuller was to an order committing the defendant to a state hospital. The California Court of Appeal considered the developing law on such confinement and the purported novelty of the legal issue to be sufficient enough to disregard the Dixon rule. Fuller, supra, 124 Cal. App. 3d at 252-55.

[10] In Duran, the petitioner had filed both an appeal and the habeas petition challenging an order revoking his probation. Id. at 635. The court felt that "the interests of justice" warranted intervention on habeas even though the appeal was pending and notwithstanding the Dixon rule. Id.

Procedural default is an affirmative defense. As such, the burden of proof is on Calderon to establish the adequacy of the state procedural default rule before claims may be barred. Karis v. Vasquez, supra, 828 F.Supp. at 1463 n. 21 ("procedural default is an affirmative defense which may be waived. [Citations omitted.] Moreover, it is respondents who seek a dismissal, and ordinarily under such circumstances the burden rests with the proponent of the defense and of the motion. [Citation omitted.]"); Johnson v. Mississippi, supra, 486 U.S. at 587 (state court's conclusion that claim was barred because it was not raised on appeal could not stand where there was "no evidence that the procedural bar relied on by [the state court] has been consistently or regularly applied"); 1a Moore's Fed. Prac., ¶ 0.314 at. p. 3148 (1991) ("affirmative defenses inferentially carried the burden of proof"); Ocean Accident & Guaranty Corp. v. Rubin, 73 F.2d 157 (9th Cir. 1934) (burden of proving affirmative defense rests upon defendant). Second, as above shown, Fields in any event established the inadequacy of the Dixon rule. Finally, Calderon does not and cannot cite any authority for the proposition that a federal court cannot, in deciding whether a state procedural rule is adequate, survey cases decided by that state, regardless of who has the burden of proof. In fact, there is clear precedent from this Court that the federal courts can do so. E.g., Johnson v. Mississippi, supra, 486 U.S. at 587-90 (this Court reviewed state cases to determine adequacy of state procedural bar); Williams v. State of Georgia, supra, 349 U.S. at 384-89 (this Court surveyed state cases to see if state procedural rule was consistently applied).

Calderon also contends that the Ninth Circuit should not have looked to California Court of Appeal decisions. Petn. at 5, 23. Calderon cites no authority to support this contention and indeed it seems quite appropriate to review all relevant published

decisions to determine if the state courts are in fact consistently applying a procedural default rule. Moreover, as above noted, three of the four California **Supreme Court** cases cited by the Ninth Circuit could have applied the Dixon rule but did not. Fields, supra, 125 F.3d at 764.

Calderon then complains that the Ninth Court survey was underinclusive in that it was limited to the time period of 1973-81. Petn. at 23. This contention is misleading. First, the Ninth Circuit had the benefit of the two seminal 1993 decisions (In re Clark and In re Harris) in which the California Supreme Court acknowledged that, at least by that time, California's procedural rules were not being consistently applied. The Ninth Circuit also had before it the cases cited by Fields, decided between 1967 and 1976, in which the California Supreme Court repeatedly stated that the Dixon rule is "merely a discretionary policy" and did not consistently apply the rule. Moreover, Calderon does not set forth a more appropriate time frame for the analysis, other than to suggest that the analysis should have started with cases decided back in 1953, when In re Dixon was decided. Petn. at 23. Cases decided prior to 1967 are not relevant, however, even **if** it could be shown that the courts in California were consistently applying Dixon then, because at least by 1967 and through the time of Fields's appeal in 1981, the Dixon rule was repeatedly acknowledged by the California courts as being merely a discretionary policy and was not being consistently applied.

Calderon next contends the Ninth Circuit erred by omitting from its analysis the summary orders often issued in California habeas cases (known as postcard denials). Petn. at 23. Those opinions are not precedent, however, and cannot be cited or relied upon. Second, the postcard denials create confusion for the federal courts attempting to decipher the

basis for the denial. Siripongs, supra, 35 F.3d at 1317; Hunter v. Aispuro, 982 F.2d 344, 347 (9th Cir. 1992), cert. den., 510 U.S. 887 (1993); Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (discussing California Supreme Court postcard denial, this Court observed that "sometimes the members of the court issuing an unexplained order will not themselves have agreed upon its rationale, so that the basis of the decision is not merely undiscoverable but nonexistent"). Indeed, it would be extremely difficult to decipher from the postcard denials (1) when Dixon could have been applied in a particular case and (2) whether it was applied in a particular case. For example, even in the instant case the postcard denial issued by the California Supreme Court is ambiguous because it does not state which specific claims are being defaulted under the Dixon rule, and which specific claims are being defaulted under California's rule against successive habeas petitions (which latter rule, under Siripongs v. Calderon, supra, was held not to be adequate and independent to bar federal review).[11] Finally, it was not necessary for the Ninth Circuit to review the postcard denials which have been issued by the California Supreme Court when the California Supreme Court in **published decisions intended to set precedent** repeatedly stated that the Dixon rule is a discretionary policy and did not consistently apply the rule. Indeed, Calderon himself contends that "an evaluation of consistency should be more than just a mechanical toting-up

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[11] The order is thus insufficient to bar federal review for this additional reason. For example, in Bean, supra, 96 F.3d at 1131, the Ninth Circuit reviewed a California Supreme Court order procedurally defaulting 39 habeas claims. That order, as the order in Fields, did not specify which of the 39 claims were defaulted under Dixon and which were defaulted under another rule previously held insufficient to bar federal review. The Ninth Circuit thus held that the order was ambiguous and not sufficient to preclude federal review. Id. The Ninth Circuit in Fields, based on its conclusion regarding the Dixon rule, did not need to analyze the issue of ambiguity in this case. Fields, supra, 35 F.3d at 760 n.3.

of state cases" (Petn. at 23) which contradicts his assertion that postcard denials—which contain no discussion or analysis—should have been included in the survey.

Calderon finally complains that the survey was undertaken with no notice to him, and without his having a chance to brief the issue. Petn. at 12. This argument lacks merit. First, Fields set forth in his appellate brief **six** California cases decided between 1967 and 1993 in which the California Supreme Court acknowledged that the Dixon rule was discretionary and inconsistently applied. Calderon had more than an ample opportunity to try to analyze these cases or any other California cases that were not cited by Fields, but he chose not to do so. Instead he argued (as he does in the Petition) that the correct time for evaluation was 1994. He should not complain now that a review of other cases in fact provides additional support for Fields's position. Indeed, Calderon in the Petition now fails even to address the cases in the Ninth Circuit survey.

In sum, the California Supreme Court, in a long line of cases decided before and after 1981, has repeatedly acknowledged the discretionary and amorphous nature of the Dixon rule and its inconsistent application. The Ninth Circuit survey was proper, albeit unnecessary, and only provides further proof of these facts and the inadequacy of the Dixon rule as of 1981.

D. Calderon's Remaining Contentions Are Without Merit

Calderon's remaining contentions are without merit and essentially amount to pleas to this Court to rewrite the law pertaining to procedural default. For example, Calderon:

> "submits that a petitioner should bear the burden of making a prima facie case of prejudicial inconsistency or discriminatory invocation of the rules.

PUBLISHER'S NOTE:

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Calderon also contends the Ninth Circuit should have been more "deferential" to the California court. Petn. at 9-11, 19-21. For example, Calderon states that the "facts on which Fields's allegations rest are now two decades old, and the State's ability to defend has been severely prejudiced. The Ninth Circuit gave no apparent consideration to this legitimate state interest." Petn. at 11. The law, however, mandates that federal review of a federal claim cannot be barred unless the state procedural default rule is adequate. This simple test does not encompass weighing the age of the case or any purported countervailing state interests.[13] Moreover, there is no evidence that the Ninth Circuit was not being "deferential," and, finally, the cases cited by Calderon in support of his "deference" argument are either not pertinent and/or in fact demonstrate that the Fields decision was correct and properly reasoned. E.g., Coleman v. Thompson, supra, 501 U.S. at 750-51 (federal review of claims defaulted by "an independent and adequate state procedural rule" is barred unless the petitioner can show cause for the default and prejudice arising therefrom or a fundamental miscarriage of justice and noting that by "applying the cause and prejudice standard" [not at issue herein] consistency of

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[12](...continued)
assignment of shares of a corporation to African Americans and held that plaintiffs' failure to comply with a state procedural rule regarding appeal—which resulted in state court twice dismissing the appeal—did "not bar" federal review because the state rule was not "so consistently applied" and is "more properly deemed discretionary"); Williams v. State of Georgia, supra, 349 U.S. at 389 ("discretionary" state procedural rule not adequate to bar federal); Jimmy Swaggart Ministries v. Bd. of Equal., 493 U.S. 378, 397-99 (1990) (claim barred where appellant did not comply with state law requiring exhaustion of administrative remedies and state did not apply exceptions to that rule "in an irregular, arbitrary, or inconsistent manner").

[13] It is Fields, who sits daily on death row and seeks to overturn his conviction and/or death penalty, who is prejudiced by delay. For example, he has asserted claims of egregious juror misconduct but already some of the jurors who could have testified in support of the claims have passed away while memories of others may be fading.

review of federal procedural rules and state procedural rules occurs); Brown v. Allen, 344 U.S. 443, 458 (1953) (if state action is based on "an adequate ground," federal review may not be required); Reed v. Farley, 512 U.S. 339, 342-49 (1994) (state court's failure to observe speedy trial provision did not give rise to cognizable habeas claim where record showed that delays were attributable to defendant, and that he did not object to the trial date when it was set or suffer prejudice from the slight delay).

CONCLUSION

Fields failed to raise claims on appeal in 1981 and thus under the law as set forth by this Court the adequacy of the Dixon rule must be determined as of that time. The California courts, in numerous cases decided prior to 1981 and thereafter, repeatedly stated that the Dixon rule is discretionary and did not consistently apply the rule. As such, the Ninth Circuit correctly held that the Dixon rule is not adequate to bar federal review of the claims Fields did not raise on appeal in 1981. Fields thus respectfully submits that there is no reason for this Court to invoke its certiorari jurisdiction and asks that this Court deny the Petition.

Dated: April 9, 1998

Respectfully Submitted,

CARLSMITH BALL

By: _____

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Stevie Lamar Fields

NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON, Petitioner,

v.

STEVIE LAMAR FIELDS, Respondent.

CERTIFICATE OF SERVICE

I, David S. Olson, a member of the United States Supreme Court Bar, hereby certify that I served one copy of the **MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** on all parties required to be served.

Service was made on counsel for petitioner by depositing on April 9, 1998, the above-referenced documents in the United States mail, with first-class postage prepaid, addressed as follows:

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NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON,

Petitioner,

v.

STEVIE LAMAR FIELDS,

Respondent.

RESPONSE OF RESPONDENT TO BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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1. **The Amicus Brief is Largely Repetitive of the Petition**

Rule 37 of the Rules of the United States Supreme Court provides that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored." The instant *amicus* brief violates Rule 37 in that the contentions made in that brief are largely repetitive of arguments made in the Petition for Writ of Certiorari ("Petition"). For example, the Criminal Justice Legal Foundation (the "Foundation") argues, as did Calderon in the Petition, "that the determination of adequacy primarily depends on the petitioner receiving fair notice of the state procedural rule's existence." *Amicus* Brief at 5, cf. Petition at 14 (Dixon was decided in 1985 and thus Fields had "sufficient notice of the rule in 1981"). The Foundation argues, as did Calderon, that because California's Dixon rule has been in existence since 1953, it should therefore be deemed adequate to bar federal review of claims defaulted thereunder. *Amicus* Brief at 9; cf. Petition at 13-15, 22-26. The Foundation argues, as did Calderon, that the decision in Fields v. Calderon, 125 F.3d 757 (9th Cir. 1997), follows "a string of erroneously decided cases" including Morales v. Calderon, 85 F. 3d 1387 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 500 (1996); Calderon v. U.S. District Court (Hayes), 103 F. 3d 72 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 2532 (1997); and Calderon v. U.S. District Court (Bean), 96 F. 3d 1126 (9th Cir. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 1569. *Amicus* Brief at 10, cf. Petition at 7-11. Like Calderon, the Foundation ignores that this Court declined to exercise its certiorari jurisdiction to review any of those "erroneously decided cases."

Like Calderon, the Foundation repeatedly criticizes the Ninth Circuit for what it perceives to be its "unforgiving application of adequacy" (*Amicus* Brief at 8), while at the same time acknowledging that the Ninth Circuit, in the Fields decision, was simply relying on precedent as set forth by this Court. Id. at 8-10. Indeed, the Foundation, like Calderon, criticizes the Ninth Circuit decision and its analysis of pertinent California cases without even discussing those or any other California cases. Under Calderon's and the Foundation's view, state cases holding that a state procedural rule is discretionary and failing to apply it regularly apparently are irrelevant to the question of the adequacy of such a rule, as is a seminal California Supreme Court case conceding that its procedural default rules were "subject to undefined exceptions." In re Clark, 5 Cal. 4th 750, 768, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993). Such view, of course, does not comport with well-established procedural default law as laid down by this Court and highlights that, in fact, the Foundation, like Calderon, is really urging that this Court disregard the longstanding "regularly and consistently applied" test for determining the adequacy of a state procedural rule and substitute one based on "notice."

Indeed, the *amicus* brief, like the Petition itself, is ultimately little more than a request that this Court dramatically change the tests that presently govern the determination of the adequacy of a state procedural default rule. Thus, the Foundation's attempts to characterize the Ninth Circuit's decision in this case as intrusive oversight that fails to respect California's proper application of its procedural default rules (*Amicus* Brief at 1, 18) is unfair because, in reality, the Ninth Circuit has merely noted that the California Supreme Court itself freely acknowledged in In Re Clark, supra, 5 Cal. 4th at 768, that California's habeas corpus procedural default rules were "subject to undefined exceptions" that provide no clear guidance

of when departure from the rule is warranted. The issue thus is not, as the Foundation suggests, whether an occasional act of grace is permissible, but whether California's Dixon rule had been regularly and consistently applied as of 1981. As the Ninth Circuit stated on this question, "[t]he California Supreme Court could hardly have stated more clearly that the application of its procedural rules governing habeas petitions had become irregular and inconsistent. The opinions in In Re Clark [supra] and in In Re Harris [5 Cal. 4th 813, 21 Cal. Rptr. 2d 373, 855 P.2d 391 (1993)] were intended to reestablish California's procedural rules governing state habeas petitions and clearly define and limit the applicable exceptions." Fields v. Calderon, supra, at 125 F.3d at 763-64. The Ninth Circuit analysis of other California cases—ignored by the Foundation—further confirmed that the Dixon rule was not regularly applied at the time of Fields's appeal in 1981, prior to the decisions in In Re Clark and in In Re Harris intended to reverse such inconsistent state practices.

2. There is No Conflict in the Circuits

In an attempt to find a reason for this Court to exercise its certiorari jurisdiction, the Foundation suggests that there is a split among the Circuit Courts of Appeals "in applying the adequacy bar." *Amicus* Brief at 13. Of course, the Ninth Circuit is the only Circuit Court that has reviewed or can review the adequacy of California's Dixon rule. No "split" does or can exist on the question of that particular rule's adequacy.

The Foundation, however, states that "the Ninth Circuit has created a presumption of irregularity [in evaluating procedural default rules], inverting the usual rule" thereby causing a purported conflict when compared to how other Circuit Courts evaluate other procedural default rules. *Amicus* Brief at 18. This statement is inaccurate. As

summarized above and set forth in the original opposition brief filed by Fields, the Ninth Circuit followed seminal cases from this Court in conducting its analysis of the adequacy of the Dixon rule and thus concluding that the critical inquiry was whether the Dixon rule had been regularly followed and consistently applied, including Coleman v. Thompson, 501 U.S. 722 (1991), Ford v. Georgia, 498 U.S. 411 (1991), and Johnson v. Mississippi, 486 U.S. 578 (1988).[1]

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[1] In Ford v. Georgia, supra 498 U.S. at 423-25, this Court reiterated that "only a 'firmly established and regularly followed state practice' may be interposed by a State to prevent subsequent review by this Court of a federal constitutional claim" (citations omitted); in Coleman v. Thompson, supra 501 U.S. at 729, this Court reiterated that state court decisions regarding federal law will not be reviewed by the federal courts if the state law ground is adequate and independent; and in Johnson v. Mississippi, supra 486 U.S. at 587, this Court reiterated that a state procedural rule is not adequate unless the rule is "strictly or regularly followed" or "consistently or regularly applied" (citations omitted). By contrast, the cases upon which the Foundation relies are either not pertinent, or do not support its contention that the longstanding test for adequacy should be disregarded. E.g., Reich v. Collins, 513 U.S. 106 (1994) (this Court reviewed a state tax refund statute to see if it complied with long established law that required a clear and certain remedy for taxes collected in violation of federal law); Barr v. City of Columbia, 378 U.S. 146, 149 (1964) ("we have often pointed out that state procedural requirements which are not strictly or regularly followed cannot deprive us of the right to review" (citations omitted)); Dugger v. Adams, 489 U.S. 401, 410 n.6 (1989) (state procedural rule is adequate where it is applied "in the vast majority of cases"). NAACP v. State of Alabama, 357 U.S. 449, 455-57 (1958) (in determining whether a procedural default rule "independently and adequately supports the judgment," this court stated that "a local procedural rule, although it may now appear in retrospect to form part of a consistent pattern of procedures to obtain appellate review, cannot avail the State here, because petitioner could not fairly be deemed to have been apprised of its existence"); Staub v. City of Baxley, 355 U.S. 313, 318-20 (1958) (decision by state court that appellant lacks standing to attack the constitutionality of an ordinance and that appellant's failure to attack specific sections of the ordinance rendered it unnecessary, under state procedure, to pass upon the constitutionality of the ordinance, was not adequate to bar federal review of the challenged ordinance, this Court noting that "whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice") (citations omitted)).

Moreover, in stark contrast to the contention that the Ninth Circuit is rigidly analyzing state procedural default rules or presuming them to be invalid, the Ninth Circuit plainly reiterated in the Fields opinion its view "that procedural rules need not be utterly mechanical. That the application of a rule requires the exercise of judicial discretion does **not** render the rule inadequate to support a state decision," so long as the standards governing the exercise of such discretion are clear. Fields v. Calderon, supra, 125 F. 3d at 762, citing Morales v. Calderon, supra, 85 F. 3d at 1392 (emphasis added).[2]

Thus, the entire premise for the Foundation's contention that there is a split in the Circuit Courts fails, as the Ninth Circuit is the only court that can evaluate the adequacy of the Dixon rule and, like the other Circuit Courts, is applying the same well-established law to determine procedural bar issues. An analysis of the cases relied upon by the Foundation in an attempt to support its conflict argument shows that there is no split in the Circuits and thus no need for this Court to exercise its certiorari jurisdiction.

For example, in Amos v. Scott, 61 F.3d 333 (5th Cir. 1995), cert. den., 516 1005 (1995), the Fifth Circuit noted that a "federal court will not review a question of federal law decided by a state court if the decision of that state court rests on a state ground that is both independent of the merits of the federal claim and adequate to support the judgment." Id. at 338. The Fifth Circuit stated that "the test for the adequacy of such a rule is that it is

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[2] The Dixon rule, however, is subject to "undefined exceptions" as acknowledged by the California Supreme Court in In Re Clark, supra, 5 Cal. 4th at 768, and thus standards governing the California court's exercise of discretion never emerged. Among other things, the rule only applies "in the absence of special circumstances" (In Re Dixon, 41 Cal. 2d 756, 759, 264 P.2d 513 (1953)), and the California Supreme Court has never explained, clarified, or limited what those exceptions might be. In Re Clark, supra, 5 Cal. 4th 750, 768 n. 8.

strictly or regularly followed by the cognizant state court. [Citations omitted.] The Supreme Court has further defined this concept of adequacy, however, to include a state procedural ground that is strictly or regularly applied *evenhandedly to the vast majority of similar claims*. [Citations omitted.]" Id. at 339 (emphasis in original). In Amos v. Scott, the court also noted that the federal courts presume there is no adequate state ground for a state court decision unless the same is "clear from the face of the opinion." Id. (Citations omitted.)

The court then analyzed the specific rule at issue in that case which was Texas's contemporaneous objection rule. The court found that Texas had "strictly and regularly" applied both the general rule itself and the exceptions thereto "in the vast majority of cases." Id. at 340-44. The court also found fault with the petitioner's analysis, noting that in a substantial majority of cases on which he relied the state court did **not** fail to follow the rule but, in fact, the cases reflected instances where "the state court first held that a defendant's claims were procedurally barred and then addressed the merits of the defaulted claim in an alternative holding." Id. at 341.

In contrast to how the California courts repeatedly described its own Dixon rule, the Amos court further noted that, based on its review of Texas decisions, the Texas rule was not "discretionary" and was applied "evenhandedly." Id. at 340-45.

The Amos court summarized its holding with respect to the adequacy of the rule at question as follows:

> "In sum, we conclude that the [Texas court] strictly and regularly applies its contemporaneous objection rule and the recognized exceptions thereto in the vast majority of cases . . .

> that come before it . . . . We hold, therefore, that the Texas contemporaneous objection rule . . . . is an independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims." Id. at 345.

The fundamental analysis employed in Amos v. Scott is virtually identical to the analysis employed by the Ninth Circuit on the question of the adequacy of California's Dixon rule. In Amos, however, the Texas courts strictly and regularly followed their rule and the clearly defined the limited exceptions thereto. By contrast, the Ninth Circuit, applying the same law as the court did in Amos, correctly found the Dixon rule to be inadequate because the California courts themselves repeatedly referred to the Dixon rule as discretionary, failed to consistently apply it, and noted that it was "subject to undefined exceptions."

The other cases upon which the Foundation relies are similarly unavailing. E.g., Duvall v. Purkett, 15 F.3d 745 (8th Cir. 1994), cert. den., 512 U.S. 1241 (1994) (in a case in which the defendant did not appeal or seek post-conviction relief in the state courts, a procedural default for failure to exhaust his claims could not be deemed to be "arbitrarily enforced" and thus inadequate to bar federal review); Prihoda v. McCaughtry, 910 F.2d 1379, 1383 (7th Cir. 1990) ("a state ground is 'adequate' only if the state court acts in a consistent and principled way"); Banks v. Horn, 126 F.3d 206, 211-13 (3rd Cir. 1997) (after noting that "in order to prevent federal habeas corpus review, a state procedural rule must be 'consistently or regularly applied,'" [citations omitted] the Third Circuit concluded that the district court erred in finding certain unexhausted claims procedurally barred because a review of state cases "demonstrate that the Pennsylvania Supreme Court does not apply the Pennsylvania

procedural bar rules consistently in death penalty cases"); Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. den., 502 U.S. 1110 (1992) (the test for determining the adequacy of a state procedural rule is whether the state courts' "actual application of the particular procedural default rule to all 'similar' claims has been evenhanded 'in the vast majority' of cases").

3. Conclusion

Much of the *amicus* brief is a rehash of arguments made and themes sounded by Calderon in the Petition. The further suggestion that there is a conflict among the Circuit Courts with respect to the determination of the adequacy of a state procedural default rule is, as above shown, without merit. Fields respectfully requests that this Court deny the Petition.

Dated: April 27, 1998

Respectfully Submitted,

CARLSMITH BALL

By: _____

David S. Olson
Attorneys for Respondent
Stevie Lamar Fields

NO. 97-1262

In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON, Petitioner,

v.

STEVIE LAMAR FIELDS, Respondent.

CERTIFICATE OF SERVICE

I, David S. Olson, a member of the United States Supreme Court Bar, hereby certify that I served one copy of the **RESPONSE OF RESPONDENT TO BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI** on all parties required to be served.

Service was made on counsel for petitioner by depositing on April 9, 1998, the above-referenced documents in the United States mail, with first-class postage prepaid, addressed as follows:

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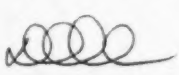

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035398-3

April 27, 1998

William K. Suter, Clerk
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: **Calderon v. Fields**, No. 97-1262

Dear Mr. Suter:

Enclosed for filing please find one original and ten copies of Response of Respondent to Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of the Petition for Writ of Certiorari in the above-referenced matter. Also enclosed is one additional copy for conforming and a self-addressed stamped envelope regarding forwarding of the same.

RECEIVED
APR 30 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Sincerely,

David S. Olson
Counsel for Respondent
Stevie Lamar Fields

DSO:la
Enclosures

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